Supreme Court, U.S.
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Docket No. 04-348

IN THE SUPREME COURT FOR THE
UNITED STATES OF AMERICA

MICHAEL K. GERARD,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err when it concluded that, under *United States v. Dunn*, 480 U.S. 294 (1987) and its progeny, no prohibited search occurred when an officer conducted a warrantless search of the secreted interior of Gerard's locked garage located across a small driveway from Gerard's home on Gerard's heavily-wooded, rural farmstead, notwithstanding Gerard's extensive efforts to prevent bystanders access to his garage?

II. Did the Court of Appeals err when it applied the incorrect legal standard and concluded that the mere presence of a distinctive odor of marijuana, standing alone, is sufficient evidence of criminal activity to provide probable cause to support a warrant to search private quarters, notwithstanding this Court's pronouncements in *Johnson v. United States*, 333 U.S. 10 (1948), that a distinct odor, standing alone, is insufficient to provide probable cause to justify a warrantless search?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

ARGUMENT 4

CONCLUSION 15

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

Cases

Bunn v. Ga., 133 Ga. App. 270 265 S.E.2d 88 (Ga. App. 1980) .7

Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir. 1998) . . .6, 9, 10, 12, 13

Johnson v. U.S., 333 U.S. 10 (1948) . . . . . .i, 14, 15

Katz v. U.S., 389 U.S. 347 (1967) 5, 7, 14

Mo. v. Fierge, 673 S.W.2d 855 (Mo. App. 1984) 7

Neb. v. Vicars, 207 Neb. 325, 299 N.W.2d 421, 425 (1980) 7

Rosencranz v. U.S., 356 F.2d 310 (1st Cir. 1966) 6, 10

Taylor v. U.S., 286 U.S. 1 (1932) . . . . . .*passim*

U.S. v. Dunn, 480 U.S. 294 (1987) . . . . . .*passim*

U.S. v. Elkins, 300 F.3d 638 (6th Cir. 2002) 15

U.S. v. Gerard, 362 F.3d 484 (8th Cir. 2004) . . . . . .*passim*

U.S. v. Gill, 354 F.3d 963 (8th Cir. 2004) 10

U.S. v. Holmes, 521 F.2d 859 (5th Cir. 1975) 7, 10

U.S. v. Moore, 329 F.3d 399 (5th Cir. 2003) 15

U.S. v. Mooring, 137 F.3d 595 (8th Cir. 1998) 12

U.S. v. Neilsen, 9 F.3d 1487 (10th Cir. 1993) 15

U.S. v. Reilly, 76 F.3d 1271 (2d Cir. 1996) 7, 10, 12, 13

U.S. v. Swepston, 987 F.2d 1510 (10th Cir. 1993) 7, 12

U.S. v. Tobin, 923 F.2d 1506 (11th Cir. 1991) 15

U.S. v. Traynor, 990 F.2d 1153 (9th Cir. 1993) 9

Walker v. U.S., 225 F.3d 447 (5th Cir. 1955) 7, 10

Williams v. Garrett, 722 F. Supp. 254 (W.D. Va. 1989) 9

Constitutional Provisions and Statutes

Fourth Amendment A-8

18 U.S.C. § 3231 (West 2004) A-8, 1

21 U.S.C. § 841 (West 2004) A-8, 1

21 U.S.C. § 846 (West 2004) A-15, 1

28 U.S.C. § 1291 (West 2004) A-15, 2

28 U.S.C. § 1254 (West 2004) A-15, 2

Federal Rules of Appellate Procedure

S. Ct. R. 13.1 2

Fed. R. App. Proc. Rule 4 (b) 2

OPINIONS BELOW

The Recommendations of the Magistrate Judge are unreported but appear in the Appendix at B-157. The Opinion and Judgment of the United States District Court for the District of Nebraska is unreported but appears in the Appendix at B-159. The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at *United States v. Gerard*, 362 F.3d 484 (8th Cir. 2004), and is included in the Appendix at B-165 for the convenience of the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves a violation of Gerard's rights under U.S. Const. amend. IV, the full text of which is included in Appendix A-8. Gerard's Petition for a Writ of Certiorari also involves the following statutory provisions: 18 U.S.C. § 3231 (West 2004); 21 U.S.C. § 841 (West 2004); 21 U.S.C. § 846 (2004); 28 U.S.C. § 1291 (West 2004); 28 U.S.C. § 1254 (West 2004). Because of their respective lengths, the full text of each constitutional provision and statute is included in the Appendix at pages A-8 through A-15.

STATEMENT OF JURISDICTION

Michael K. Gerard ("Gerard") appeals from a judgment and sentence imposed by the United States District Court for the District of Nebraska, which judgment and conviction was subsequently affirmed by the Eighth Circuit Court of Appeals on April 2, 2004. The trial court properly exercised jurisdiction pursuant to 18 U.S.C. § 3231 and 21 U.S.C. § 841, as Gerard was charged with an offense against the laws of the United States. Gerard's conditional plea was accepted by the district court, and on February 27, 2003, Gerard was sentenced to serve 12 months and 1 day imprisonment. The judgment and sentence were entered on that same day, and Gerard timely appealed to the

United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit properly exercised jurisdiction over Gerard's appeal pursuant to Fed. R. App. Proc. Rule 4(b), and 28 U.S.C. § 1291. On April 2, 2004, the Eighth Circuit held that the Nebraska State Patrol's search of Gerard's secreted, locked garage on his rural farmstead was constitutional, and Gerard's conviction was affirmed. Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. § 1254, Gerard filed a Petition for Writ of Certiorari within ninety (90) days of the Eighth Circuit's opinion and judgment and was given an additional 60 days to file this Petition, conferring jurisdiction upon this Court.

STATEMENT OF THE CASE

A. Statement of Facts

On February 17, 2002, Nebraska State Trooper Jeff Crymble was investigating reports of a stolen vehicle near Michael Gerard's ("Gerard") farmstead in rural Nebraska. (App. B-115:17-116:10) With the assistance of other troopers, two suspects were ultimately apprehended. (App. B-92:3-5; 117:7-117:15) Upon being searched, a credit card bearing Gerard's name was seized from them. (App. B-92:11-14) Neither of the men arrested made any statement regarding the stolen vehicle or credit card. (App. B-118:11-19) An attempt to call Gerard's phone number received no answer. (App. B-95:14-96:5)

When the attempt to reach Gerard by phone failed, Crymble and two other officers drove separate vehicles to Gerard's farmstead to find out why the arrested suspects had Gerard's credit card and to follow up on the stolen vehicle investigation. (App. B-98:9-99:4;100:1-14) Upon arrival, Crymble observed two dogs in a fenced yard surrounding one side of Gerard's farmhouse. (App. B-74:7; 106:8-9) Exhibit 101 (received in evidence at the suppression hearing, App. A-1-2; App. B-75:19) is an aerial photograph of Gerard's property that accurately depicts Gerard's farmhouse and outbuildings on his farmstead.

Crymble approached a two-car garage across the driveway from Gerard's house and attempted to enter the garage by lifting the overhead doors. (App. B-107:11-18) Unsuccessful, he tried to open another door. (App. B-108:2-5) All of the doors were locked and Crymble was unable to gain entry. (App. B-107:16-108:15) Although he did not have a search warrant, Crymble acknowledged that when he tried to open the doors to the garage, his purpose was to look into the garage. (App. B-133:16-18) Crymble noticed lights on inside the garage, and when he knocked on the door to the garage and yelled, he received no response. (App. B-109:11-15)

Unable to gain entry into the garage, Crymble ascended a ladder that he had placed against the side of the garage in an attempt to peer through a vent at the top. (App. B-110:16-111:3; 111:12-112:2; 133:12-15) Although he was unable to see through the vent, Crymble claims that he smelled the odor of raw marijuana while atop the ladder. (App. B-112:2-9) Crymble climbed down from the ladder and called his supervisor, Richard McKain, who obtained a search warrant relying upon information obtained by Crymble while he was atop the ladder. (App. B-113:8) A warrant was subsequently issued and Gerard's farmstead, including the locked garage, was searched. (App. B-35:7-42:5). The evidence found during that search resulted in Gerard's conviction and sentence, which he now appeals.

B. Nature of Proceedings

Prior to entering his conditional plea, Gerard filed a motion to suppress evidence. An evidentiary hearing on Gerard's Motion was held before United States Magistrate David L. Piester, whereat the primary issue was whether Nebraska State Patrol Trooper Crymble conducted an illegal search when, without a warrant or exigent circumstances, he entered the area adjacent to Gerard's farmhouse and garage and attempted to enter the locked garage on Gerard's farmstead by climbing a ladder to peer inside of the garage prior to detecting the odor of marijuana. Magistrate Piester found Crymble's actions violative of the

Fourth Amendment and concluded that the warrant would not have been issued absent the illegally obtained information concerning the odor of marijuana. As such, the Magistrate recommended that Gerard's motion to suppress be granted in its entirety.

The Government objected to Magistrate Piester's Report and Recommendation, contending that the garage was not within the curtilage of the farmstead. The district court agreed, sustained the Government's objection, and denied Gerard's motion to suppress. The district court found that, because the garage was outside of the fenced yard to the farmhouse and across a driveway, Crymble's conduct in attempting to search the garage and climbing a ladder to peer inside of it did not run afoul of the Fourth Amendment. The Eighth Circuit, ignoring important aspects of the record and distorting others, affirmed the district court's determination and Gerard's conviction. Because the Eighth Circuit's opinion disregards prior decisions of this Court, and conflicts with the decisions of other circuits in cases similar to this, Gerard respectfully requests that this Court issue a Writ of Certiorari and correct the Eighth Circuit's misapplication of the law.

ARGUMENT

I. THE EIGHTH CIRCUIT'S ERRONEOUS DETERMINATION THAT GERARD'S SECRETED, LOCKED GARAGE WAS OUTSIDE THE CURTILAGE OF HIS RURAL FARMHOUSE DISREGARDS THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

Gerard's locked garage across the driveway from his home, but in the same wooded enclosure, was within the curtilage of his home. In deciding whether Gerard's garage was within the curtilage of his farmhouse, the "central component" is "whether the [garage] harbors the intimate activity associated with the sanctity of [Gerard's farmhouse] and the privacies of

life." *U.S. v. Dunn*, 480 U.S. 294, 300 (1987) (internal quotations omitted). This Court has specifically provided that this determination hinges upon the analysis of several factors: (1) the proximity of the garage to the farmhouse; (2) whether the farmhouse and garage are within the same enclosure; (3) the nature and uses of the garage; and (4) the steps Gerard took to protect the garage from observation by people passing by. *Id.* at 301. These factors are not to be mechanically applied, but rather serve as analytical tools to help make the ultimate determination whether the area in question - Gerard's locked garage immediately across the driveway from his farmhouse - is so intimately tied to his home that it should be placed under the home's "umbrella" of Fourth Amendment protection. *See id.*

Long ago, this Court held that a search of a garage adjacent to a defendant's home contravened the Fourth Amendment and required suppression of all evidence obtained as a result of the violation. *See Taylor v. U.S.*, 286 U.S. 1, 5-6 (1932). *Taylor* explained that when prohibition agents searched a small metal garage on the corner of defendant's lot, adjacent to his dwelling house, "the two houses [were] part of the same premises." *Id.* at 5. As the agents approached the garage, they could smell the odor of whisky coming from within; they looked inside with a searchlight, and, upon noticing whisky inside, the agents "broke the fastening upon a door, entered, and found 122 cases of whisky." *Id.* The agents made no effort to obtain a warrant, although they had "abundant opportunity" to do so. Without specifically addressing whether the garage was within the curtilage of Taylor's "premises," the Court held that "in any view, the action of the agents was inexcusable and the seizure unreasonable." 286 U.S. at 6.

The Fourth Amendment protects people, not places, and what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz v. U.S.*, 389 U.S. 347, 351 (1967). Gerard's garage was not accessible to the public. Like *Taylor*, Gerard had a reasonable expectation of privacy in the contents of his garage in an area adjacent to his home. (*See* App. A-1-2; App. B-149:16-150:5)

As the Magistrate aptly pointed out, Gerard's garage was not accessible to the public and most of society has a reasonable expectation of privacy in their garage. (App. B-114:6-14) Moreover, Crymble's many attempts to gain entry in this case are distinguishable from *Taylor* only insofar as Crymble did not break the locks to gain entry. Aside from this slight deviation, Crymble's conduct here is very much akin to the "inexcusable" and "unreasonable" conduct condemned by this Court in *Taylor*. 286 U.S. at 6.

Simply stated, Gerard's Fourth Amendment rights were violated by Crymble's illegal search. Read together, *Katz, Taylor* and *Dunn* compel the conclusion that the Eighth Circuit erroneously concluded that Gerard had no expectation of privacy in his garage; Gerard's garage was "part of the same premises" as his home, and the Eighth Circuit disregarded well-entrenched jurisprudential principles of both this Court and other Circuits when it concluded to the contrary. *See, e.g., Taylor*, 286 U.S. at 5-6.

A. Gerard's Garage Was Closer To His Farmhouse Than Many Other Buildings That Have Been Found Within A Home's Curtilage.

Gerard's garage was within the curtilage of his farmhouse. Gerard's garage was so close to his home that even the investigating officer that searched the garage initially recalled that it was an "attached garage" that, along with the barn, comprised a "typical farmstead." (App. B-100:19-101:20) The officer's mistaken recollection notwithstanding, exhibit 101 reflects that the proximity of the farmhouse to the garage is certainly closer than in cases where Circuits and state courts have held outbuildings to be within the curtilage of a home, and Gerard's garage is certainly farther from the road than from his home. *See, e.g., Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 597-601 (6th Cir. 1998) (holding that garage fifty to sixty yards behind home, and eighty to ninety yards from street was within curtilage of residence); *Rosencranz v. U.S.*, 356 F.2d 310, 313

(1st Cir. 1966) (holding that outbuilding separated from home by driveway was within coverage of Fourth Amendment); *U.S. v. Reilly*, 76 F.3d 1271, 1276-79 (2d Cir. 1996) (holding that small building 375 feet away from residence was within curtilage of home); *U.S. v. Holmes*, 521 F.2d 859, 869-70 (5th Cir. 1975) (holding that shed twenty yards from home, in rural area, was within curtilage); *Walker v. U.S.*, 225 F.3d 447, 449 (5th Cir. 1955) (citing cases where outbuildings, including smokehouse, garage, and chicken shed were included in curtilage of home); *U.S. v. Swepston*, 987 F.2d 1510, 1515 (10th Cir. 1993) (holding chicken shed nearly 100 feet from home was within curtilage); *Mo. v. Fierge*, 673 S.W.2d 855, 856 (Mo. App. 1984) ("[C]urtiliage includes all outbuildings used in connection with the residence, such as garages, sheds, barns, yards, and lots connected with or in the close vicinity to the residence."); *Neb. v. Vicars*, 207 Neb. 325, 330-31, 299 N.W.2d 421, 425 (1980) (holding calf shelter 100 feet away from home was within curtilage in order to allow shelter to be searched pursuant to warrant identifying only home); *Bunn v. Ga.*, 133 Ga. App. 270, 272-73, 265 S.E.2d 88, 90 (1980) ("[C]urtilage includes the yards and grounds of a particular address, its garages, barns, buildings, etc."). The proximity of Gerard's farmhouse and garage is emphasized by the fact that Exhibit 101 shows Gerard's garage and his home, but not the road. (App. A-1-2) Again, the central focus in this case is whether, irrespective of distance, Gerard sought to preserve the contents of his garage as private. *See Katz*, 389 U.S. at 351.

The Eighth Circuit's decision eviscerates the warrant requirement as it applies to any building outside the home. If the officers had obtained the warrant prior to entering Gerard's farmstead, and the warrant identified only the farmhouse and not the other buildings, the officers would have justified their search of the other buildings on the farmstead under the auspice that those buildings *are* within the curtilage of the home. *See Vicars*, 207 Neb at 330-31, 299 N.W.2d at 425. In order to avoid constitutional problems, however, in this case, the government asserts that such a building is *not* within the curtilage. In

essence, the finding that no Fourth Amendment violation occurred because the garage was outside of the fenced yard and across the driveway would allow a search of all the buildings on Gerard's farmstead—except his home—without a warrant. Such a rule directly ignores this Court's opinions in *Taylor* and *Katz*, obviates the need for a warrant to search the buildings at all, and distorts this Court's analysis in *Dunn*. Moreover, it expressly ignores the Eighth Circuit's own determination that Gerard's garage "was likely to be used for private activities," *Gerard*, 362 F.3d at 488, and the personal liberties preserved by the Fourth Amendment. *See Katz*, 389 U.S. at 351.

The Eighth Circuit incorrectly relied heavily upon the fact that the record does not provide the exact distance from Gerard's house to his locked garage. The Court of Appeals explained that "[n]either party included in its brief the proximity of the garage to the farmhouse." (*Gerard*, 362 F.3d at 487.) Exhibit 101 clearly establishes the proximity of the garage to the farmhouse, (App. A-1-2) The Court of Appeals ignored that the record does show that Gerard's garage is a very short distance from his home—certainly close enough to the home to be within its curtilage. (*See* App. A-1-2) The Eighth Circuit also disregarded the government's own testimony that the garage was "close" in proximity, part of the same farmstead that is enclosed in the same heavy, dense, wooded vegetation, much closer to Gerard's home than to the passing road, and that Gerard had locked the garage before he went on his trip, just as he did his home. *See, e.g., Gerard*, 362 F.3d at 488. If the Eighth Circuit's flawed analysis is allowed to stand, there is absolutely no guidance on how, if at all, the "distance" prong of *Dunn* is to be applied since Gerard's garage was further from the road than buildings found by other circuits to be within the curtilage of respective residences and closer to Gerard's home than other buildings also found to be within the curtilage of respective residences. The Eighth Circuit ignored other circuits' decisions that correctly apply this Court's jurisprudence, and this Court must rectify this misapplication of the law.

B. Gerard's Farmhouse And Garage Are Within The Same Natural Enclosure, All Of Which Is Within The Curtilage Of Gerard's Farmhouse.

Gerard's farmhouse and his locked garage are surrounded, nearly in their entirety, by heavy, dense, wooded vegetation. (See App. A-1-2) The "enclosure" prong of the *Dunn* analysis can be established by natural, as well as artificial boundaries. *See, e.g., Williams v. Garrett*, 722 F. Supp. 254, 260-61 (W.D. Va. 1989) (holding boxwood hedge and heavy woods created a natural enclosure around home). Although there is some testimony reflecting that there may have been some fencing around his house, the proper focus of this factor is on "whether the interior fencing clearly demarcates the curtilage." *U.S. v. Traynor*, 990 F.2d 1153, 1158 (9th Cir. 1993). The area including the farmhouse and the garage are clearly separated from the rest of the farmstead by the vegetation within which they are situated. *See id.* Accordingly, the Court of Appeals incorrectly determined that the fencing around part of Gerard's house "clearly demarcated" the curtilage of Gerard's farmhouse.

Gerard's home and garage are surrounded by the same "tight" bundle of trees, enclosing both into the same wooded enclosure, within a much larger enclosure established by the trees at the perimeter of Gerard's property. One officer even testified that the foliage at the time of the search was much denser than portrayed in Exhibit 101. (App. B-73:7-11) Moreover, as portrayed in Exhibit 101, heavy treeline and vegetation forms a boundary between Gerard's farmstead and the property to the immediate left of the farmstead. (App. A-1-2) Similarly, heavy wooded vegetation precludes the property from being seen from the road near Gerard's property. (*Id.*) At a minimum, the dense wooded vegetation surrounding the house and the garage establish the boundaries of the area from which Gerard sought to preclude intrusion from members of the public, *i.e.*, his home and its curtilage. Other courts have held that outbuildings are within the curtilage when there was no evidence of a natural barrier

encircling the home and the outbuilding. *See, e.g., Daughenbaugh*, 150 F.3d at 597-601; *Rosencranz*, 356 F.2d at 313; *Reilly*, 76 F.3d at 1276-79; *Holmes*, 521 F.2d at 869-70; *Walker*, 225 F.3d at 449; *Swepston*, 987 F.2d at 1515. Consequently, the natural barrier only supports the conclusion that Gerard's garage was within the curtilage, as the garage "was sufficiently blocked from public view by natural barriers to establish that the second *Dunn* factor weighs in favor of finding that [Gerard] possessed a reasonable expectation of privacy in [that] area." *Daughenbaugh*, 150 F.3d at 599.

The Eighth Circuit emphasized that "[n]o internal fences prevented persons from approaching [Gerard's] garage." 362 F.2d at 488. Put another way, the Eighth Circuit held that a fence surrounding at least one side of the house supported the finding that Gerard's garage was not within the curtilage of his farmstead, while simultaneously maintaining that because no internal fence prevented persons from approaching Gerard's garage, the garage must be outside of the curtilage. *See* 362 F.2d at 488. While fencing may prove useful in determining whether a particular part of a farmstead is within the curtilage of a farmhouse, fencing is not determinative. *See Reilly*, 76 F.3d at 1279. The most telling flaw in this analysis is that this Court has previously held that a locked garage was within the curtilage of a home when there was no fencing separating the home from the garage. *See Taylor*, 286 U.S. 1. As such, the Court of Appeals' misplaced reliance upon the mere absence of a fence cannot be sanctioned.

In addition to its contradiction with opinions of this Court and its sister circuits, the Eighth Circuit's analysis is not even consistent with its own jurisprudence. In *United States v. Gill*, 354 F.3d 963, 969 (8th Cir. 2004), the Eighth Circuit held that an officer was justified—*by exigent circumstances*—to place a ladder against a building to look through an open window to ensure that no one inside was in need of assistance. In that case, the Eighth Circuit expressly stated that it was not deciding whether the officer conducted a search when he peered from the top of the ladder; the Court of Appeals simply *assumed* that a

search took place when the officer did so. *See Gill*, 354 F.3d at 969. As such, the Eighth Circuit's determination in this case that no search occurred contradicts underlying assumptions in its own past decisions, and this glaring inconsistency must be corrected.

C. Gerard's Use Of The Garage For Private Activities Supports A Finding That the Garage Was Within The Curtilage Of Gerard's Farmhouse.

The Eighth Circuit agreed that Gerard used his garage as an integral part of his domestic life, and that "reasonable officers would expect that the garage was likely to be used for private activities." *See Gerard*, 362 F.3d at 488. Finding "typical signs of private activities," the Eighth Circuit noted that the "garage's doors were locked, electricity was wired to the garage, and it was close to the farmhouse, which are typical signs of private activities." *Id.* The Eighth Circuit ultimately concluded that the "third *Dunn* factor weighs in favor of finding that Gerard's garage was protected," 362 F.3d at 488, and that Gerard's garage was used for private details that were associated with intimacies of his private life at home. *See Dunn*, 480 U.S. at 302. In reaching its conclusion, the Court of Appeals relies upon Gerard's testimony; the record unequivocally shows, however, that Gerard did not testify, and the Eighth Circuit's erroneous citation to Gerard's testimony begs the question of how it reached its conclusion in this regard. Nonetheless, this portion of the Eighth Circuit's opinion was correct, and when considered with those portions wherein the Court simply failed to consider the evidence, the Eighth Circuit's conclusion simply does not coincide with the Fourth Amendment jurisprudence of this Court or other circuits.

D. Gerard's Efforts To Preserve The Secret Nature Of His Garage Establish That He Had A Reasonable Expectation Of Privacy In His Garage.

Gerard did not expect, nor did he want, the public peering into his garage. This Court has explained that Gerard's expectation of privacy in his garage must be analyzed in light of "the steps taken by [him] to protect the area from observation by people passing by." *Dunn*, 480 U.S. at 301. Especially significant in this regard is whether the law enforcement officers possessed objective data indicating that the garage was not being used for intimate activities of the home. *See id. See also U.S. v. Mooring*, 137 F.3d 595, 596-97 (8th Cir. 1998). In this case, the law enforcement officers had no objective data suggesting that Gerard used the garage for anything except domestic purposes, and this, coupled with the steps Gerard took to prevent the public from peering into his garage, compels the conclusion that Gerard had a reasonable expectation of privacy in his garage.

Prior to entering Gerard's farmhouse and curtilage, the officers had *no* information concerning Gerard's use of the garage. *See also Daughenbaugh*, 150 F.3d at 599. The officers had *no* information regarding Gerard's use of electricity or his electric bills, *no* information regarding unconcealed heat emissions, and *no* information that Gerard's locked garage was being used for anything *but* domestic purposes, *except* what was gathered from the illegal search. Finally, Gerard took *extensive* steps to prevent strangers' access. *Cf. Mooring*, 137 F.3d at 596-97. As such, there was *no* justification for the illegal search in this case.

The Eighth Circuit correctly agreed that "[o]bjective data does not include that found only after officers have invaded the area in question." *Gerard*, 362 F.3d at 488. *See also Reilly*, 76 F.3d at 1279; *Daughenbaugh*, 150 F.3d at 599. As in *Reilly* and *Daughenbaugh*, all data possessed by the officers, prior to their illegal search, was only that Gerard's garage was situated close to his home and enclosed within the same wooded area. *See also Swepston*, 987 F.2d at 1515. Even after their illegal entry onto the premises, the only information that the officers possessed supported the conclusion that the garage was used for domestic purposes, which data the Eighth Circuit stated supported the conclusion that Gerard's garage was used for private activities.

This conclusion is buttressed by the fact that Gerard placed padlocks on all three doors to the garage, to make sure that the public did not have access to the garage. (App. A-3-6; App. B-124:16-127:10) Finally, Gerard placed cardboard or plastic on the windows so that trespassers could not see into his garage from the outside. (App. B-122:7-9)

Gerard took great strides to prevent trespassers from peering into the locked garage in the area directly adjacent to his home, and the contents were only visible after a person entered his farmstead and approached the garage. *See Daughenbaugh*, 150 F.3d at 601. The totality of the circumstances evinces that this case is unlike *Dunn*, where the defendant "did little to protect the barn area from observation by those standing in the open fields." 480 U.S. at 303. As such, Gerard's efforts under the fourth prong of *Dunn* that examines what, if any, efforts the individual has taken to keep information private, suggest that Gerard had clearly manifested an expectation of privacy in the locked garage in the area adjacent to his farmhouse. *See Reilly*, 76 F.3d at 1279.

The Eighth Circuit's opinion reflects that it failed to look at the evidence. Although Gerard may have posted no signs to exclude strangers from the garage, Gerard placed large *locks* on all "three of the doors to the garage." *See Gerard*, 362 F.3d at 488. (See also App. A-3-6) Locks are certainly more likely to prevent unwanted access than signs. Further, the evidence does *not* show that Gerard's drive "led from the road directly to the garage," (see App. A-1-2), but if it did, that fact is inconsequential, as nearly every driveway leads from the road directly to the garage—that is, after all, the very purpose of a driveway. *See* Gerard, 362 F.3d at 488. The garage was set far back from the road, situated so that it did not face the road, and was locked so that the public could not gain entry. (App. B-124:16-127:10) Large trees in the farmyard prevented passers-by from looking in from the road, and the inside of the garage clearly was not visible from the road due, in part, to Gerard's placing of cardboard or plastic in the windows. (App. A-3; App. B-122:7-9). Certainly, in light of the efforts

taken to preserve privacy, Gerard's garage was no less private than the public phone booth along a public sidewalk as in *Katz*. Consequently, the officers' attempts to gain entry to the locked garage, without first obtaining a warrant, violated the Fourth Amendment, and, under the analysis prescribed by *Dunn* and its progeny, the Eighth Circuit should have held, as this Court prescribed in *Dunn* and *Taylor*, that Crymble's search of Gerard's private garage was unconstitutional. A thorough examination of the record would have led to this conclusion.

II. THE EIGHTH CIRCUIT'S ERRONEOUS DETERMINATION THAT THE ODOR OF MARIJUANA, STANDING ALONE, IS SUFFICIENT TO SUPPORT PROBABLE CAUSE TO JUSTIFY THE ISSUANCE OF A SEARCH WARRANT DIRECTLY CONTRADICTS THIS COURT'S PRIOR DECISIONS.

Contrary to the Eighth Circuit's analysis, this Court has never held that the presence of a distinctive odor, standing alone, gives rise to probable cause sufficient to justify a search. *Compare Taylor*, 286 U.S. at 5 *with Gerard*, 362 F.3d at 489. This Court has explained that if the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, that the presence of such an odor may *support* a finding of probable cause. *Johnson v. U.S.*, 333 U.S. 10, 13 (1948). As such, the Eighth Circuit's holding that "the odor of marijuana, standing alone, is sufficient to support probable cause" is directly contrary to this Court's previous pronouncements of how the Fourth Amendment is to be applied, and as to what evidence *must* be present before an officer or government agent can proceed with a search in compliance with the Fourth Amendment. *See Gerard*, 362 F.3d at 489.

This Court must avail itself of the opportunity to confirm that the Fourth Amendment prevents officers from thrusting themselves into areas that individuals have sought to preserve as private, particularly where, as here, an individual chooses to

dwell in reasonable security and takes great steps to preserve his freedom and homestead from surveillance. *See Johnson*, 333 U.S. at 14. The touchstone principle of the Fourth Amendment is to require probable cause determinations to be made by neutral, detached magistrates based upon the totality of circumstances—which may include an odor of marijuana—that confirm that the officer's belief is reasonable. *See Johnson*, 333 U.S. at 13. Despite this Court's clear guidance that the detached magistrate must hear testimony from a qualified affiant that a distinctive odor identifies a forbidden substance, some Circuits (including the Eighth Circuit in this case) have held that the odor of marijuana, *standing alone*, is sufficient to justify probable cause. *See Gerard*, 362 F.3d at 489. *See also U.S. v. Moore*, 329 F.3d 399, 405 (5th Cir. 2003); *U.S. v. Elkins*, 300 F.3d 638, 659 (6th Cir. 2002); *U.S. v. Neilsen*, 9 F.3d 1487, 1490-91 (10th Cir. 1993); *U.S. v. Tobin*, 923 F.2d 1506, 1512 n. 4 (11th Cir. 1991). This simply is not the law, and this Court must make certain that the Courts of this country refrain from improperly chipping away at the Fourth Amendment in ways this Court has already condemned. *See Johnson*, 333 U.S. at 13.

CONCLUSION

For the foregoing reasons, Michael K. Gerard respectfully requests that this Court issue a Writ of Certiorari to the Eighth Circuit so that this Court may correct the Eighth Circuit's disregard of this Court's Fourth Amendment jurisprudence, the evidence, and the decisions of other Circuits in cases involving the warrantless search of curtilage in regard to rural properties. Gerard also respectfully requests that this Court confirm that the odor of marijuana, standing alone, is not sufficient to provide probable cause to search a private area without a warrant.

Respectfully Submitted,

MICHAEL K. GERARD, Petitioner

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United States Supreme Court Bar
on October 15, 1984

Docket No. _____

IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA

MICHAEL K. GERARD,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

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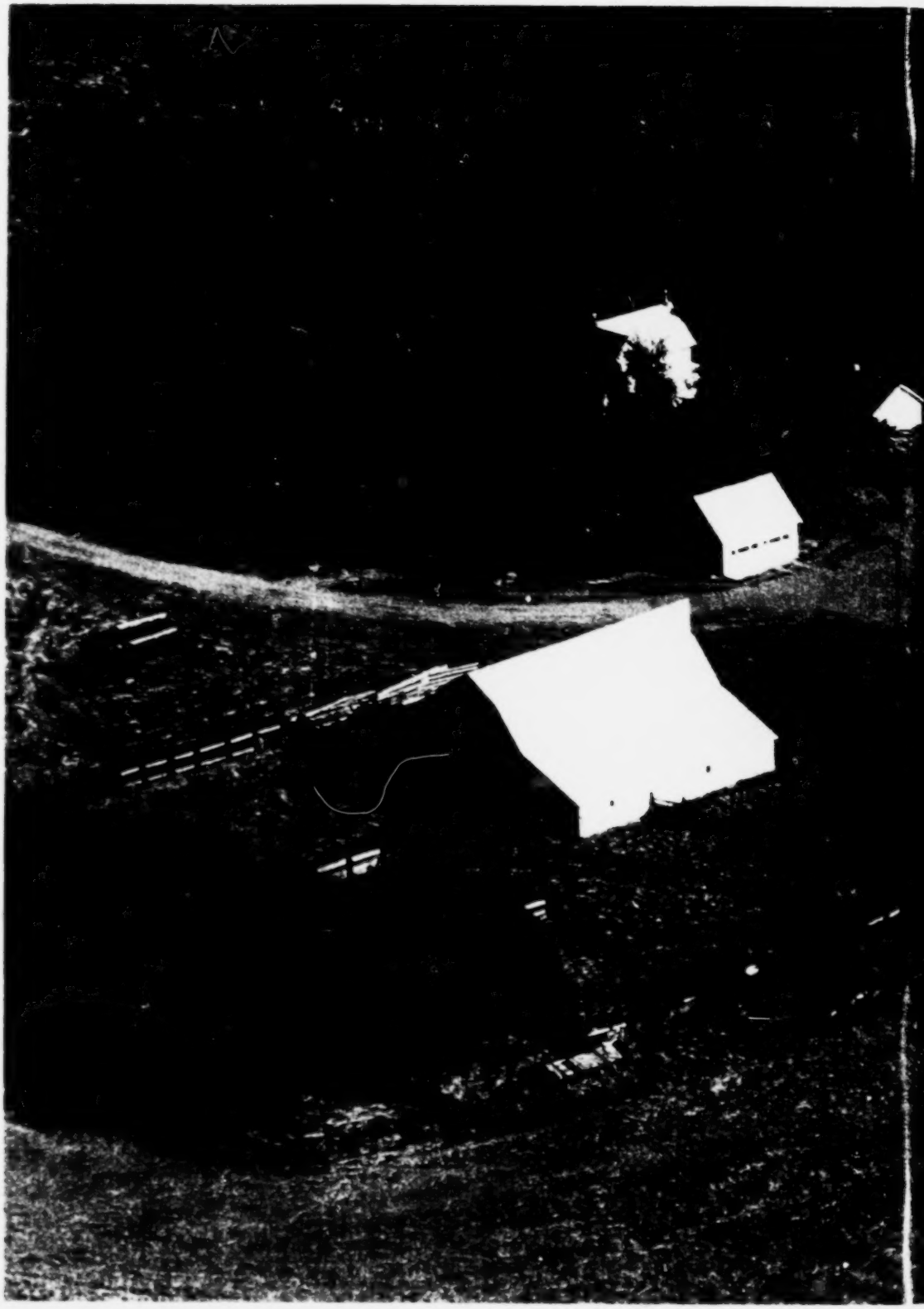

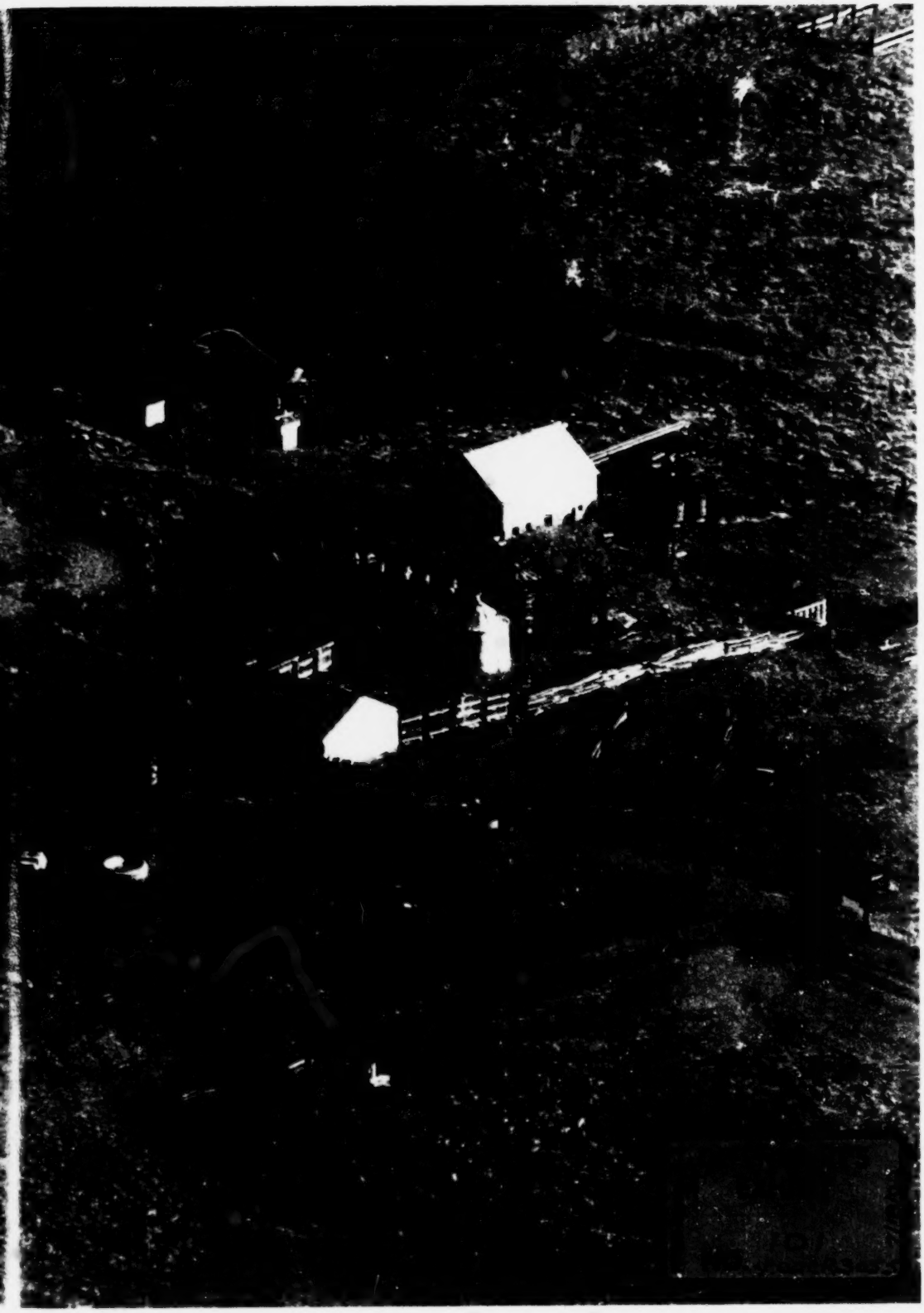

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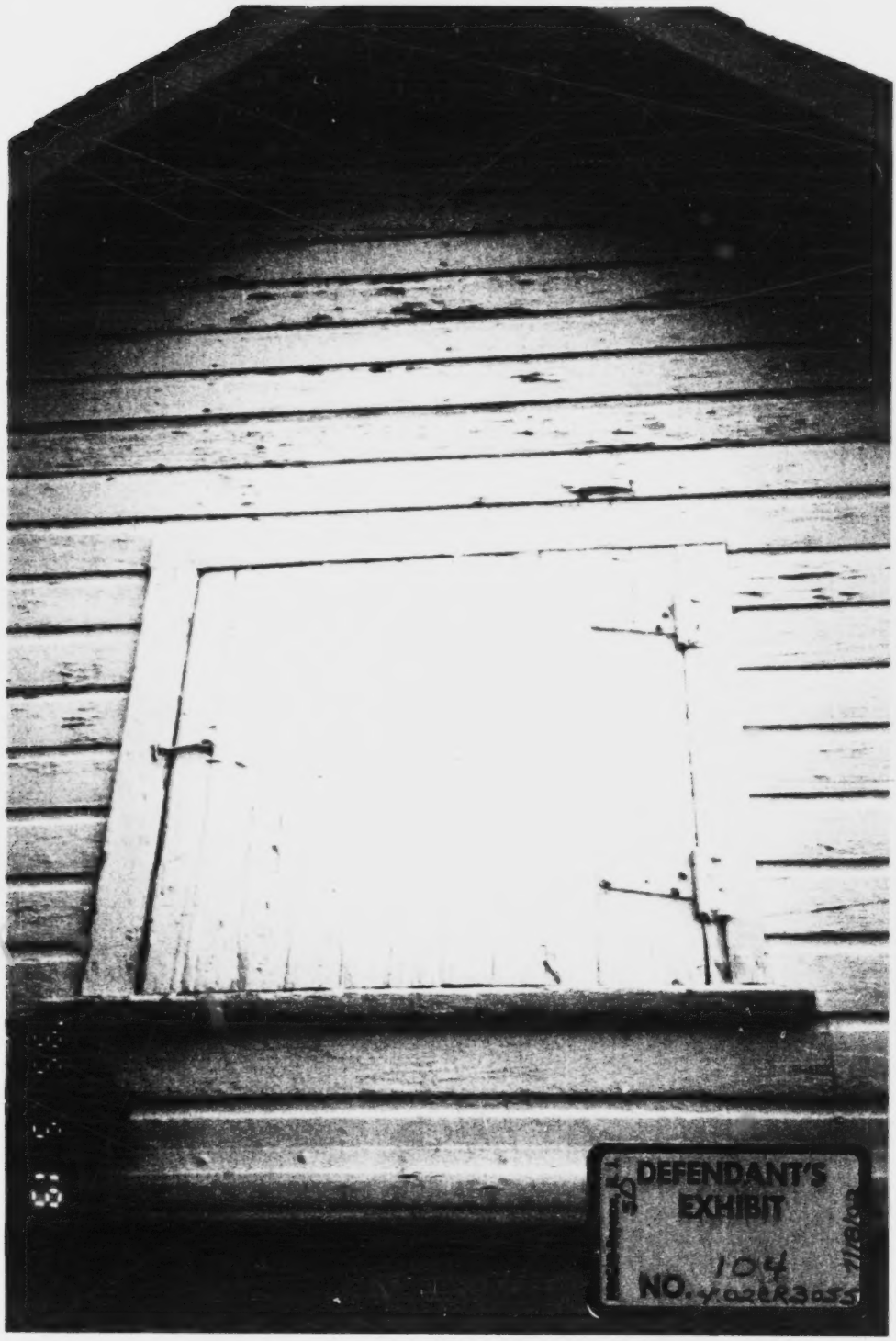
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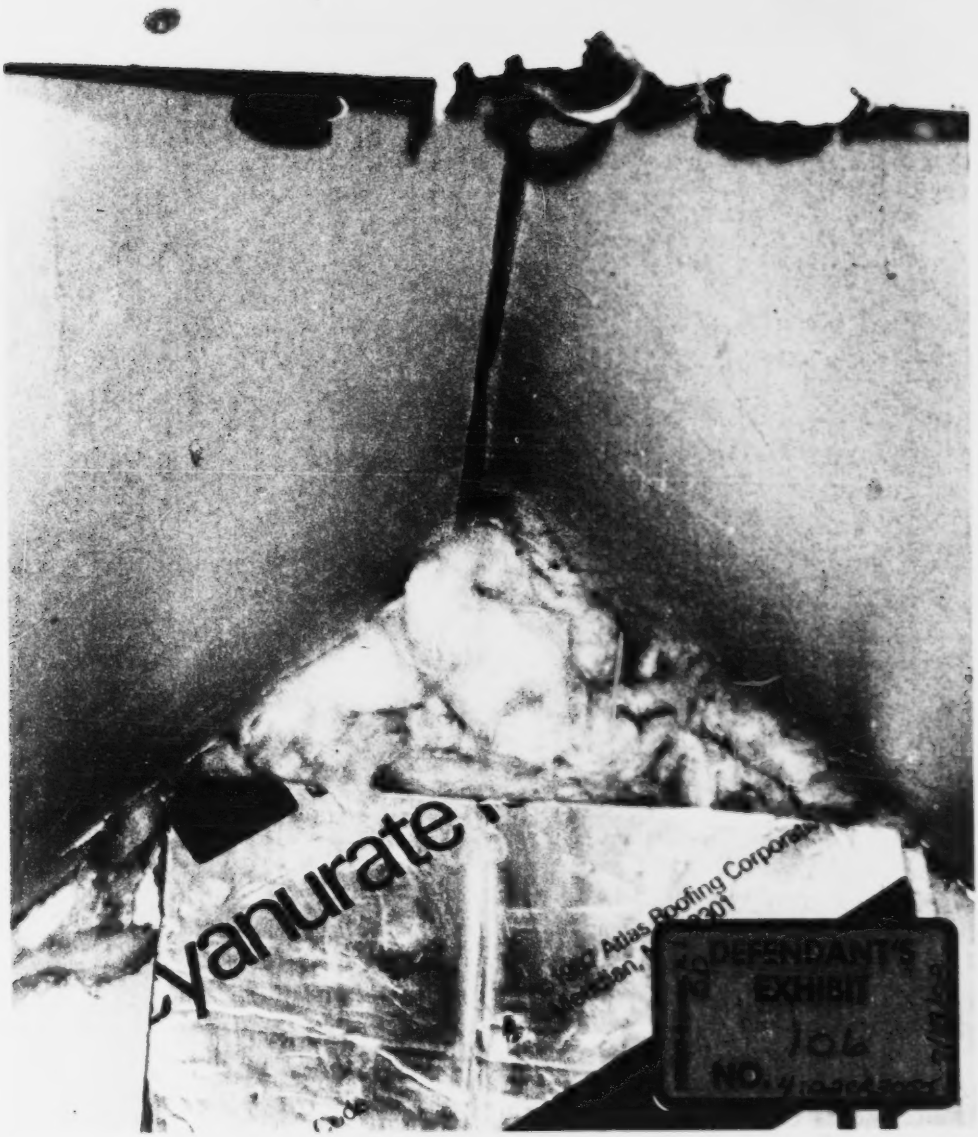
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APPENDIX

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

21 U.S.C. § 841

(a) Unlawful acts
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties
Except as otherwise provided in section 859, 860, or 861, of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
(1)(A) In the case of a violation of subsection (a) of this section involving--
(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or
(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony

drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861, of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or
(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the

defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and

shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other

than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing

a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals
Any person who knowingly or intentionally--
(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;
(2) possesses or distributes a listed chemical knowing, or having reasonable
cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or
(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;
shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined
(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.
(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.
(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other

triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty
In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals
(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.
(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be

had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Docket No. _____

IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA

MICHAEL K. GERARD,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX B TO PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

MICHAEL K. GERARD, Petitioner

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Suite 340, The Apothecary
140 N. 8th Street
Lincoln, NE 68508
(402) 441-4848

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:02CR3055
	)	
Plaintiff,	)	
	)	
vs.	)	TRANSCRIPT
	)	
MICHAEL K. GERARD,	)	
	)	
Defendant.	)	

Hearing held before the Honorable David L. Piester, United States Magistrate Judge, on July 18, 2002 in Lincoln, Nebraska.

APPEARANCES:

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Assistant U. S. Attorney
487 Federal Building
Lincoln, Nebraska — for Plaintiff

Mr. Sean Brennan
Attorney at Law
140 N. 8th, Suite 340
Lincoln Nebraska — for Defendant

I-N-D-E-X

WITNESS	Direct	Cross	Redirect	Recross
Richard McKain	16	34	62	
Jeff Crymble	64	88	--	104

(At 9:32 a.m., the following proceedings were held.)

THE COURT: Mr. Gillan.

MR. GILLAN: Your Honor, this is the United States versus Michael Gerard, 4:02CR3055. We're here for a motion to suppress.

THE COURT: Mr. Brennan, is the defense ready to proceed?

MR. BRENNAN: Yes, Your Honor, we're ready.

THE COURT: All right. Do you wish to make an opening statement?

MR. BRENNAN: Yes.

THE COURT: All right.

MR. BRENNAN: The basis of the motion to suppress is an alleged illegal search of a farm, including all of the buildings on the farm, located in Keith County, Nebraska just south and east of the Roscoe exit off of Interstate 80.

The -- a number of law enforcement officers went to that farm on February 17th, 2002. The basis for them going to the farm stemmed from a pursuit and arrest of two young men who had stolen a car in Minnesota and on February 16th, 2002 a Nebraska State Patrol trooper, at about 10:00 p.m., stopped that car for a traffic violation. The car sped away and there was a pursuit between Paxton, Nebraska and Ogallala, Nebraska.

The troopers lost sight of the car but some

police officers from Ogallala found, or saw the car getting back on the interstate and proceeding to return in an easterly direction on Interstate 80, alerted the troopers and two State Patrol troopers chased the vehicle again going east on Interstate 80.

Some truck drivers -- the vehicle was pulling away from the troopers -- but some truck drivers told the troopers by radio that they'd seen the vehicle exit at the Roscoe exit. So troopers followed southbound from Roscoe, from the Roscoe exit, I don't know that they ever actually saw the vehicle again, but they looked for it in the vicinity of the area south and east of the Roscoe exit that night and called out the State Patrol aircraft to assist in the search.

Apparently they were unable to find the vehicle that night but the next morning a farmer reported that her pickup was being stolen by two

people. The trooper the night before had, on his radio, said that the vehicle was occupied by two people. Another farmer had told a sheriff's deputy that he saw two people that next morning that matched the description that was given by the lady who called in and said, hey, somebody's stealing my pickup and somebody else got in the pickup right after they stole it.

Another farmer said that two people, who he described in a fashion similar to what the lady had described, said two guys asked me for a ride, I told them no, they went that way. Pointing toward the north and where the Interstate was.

The aircraft got in the air again, the State Patrol aircraft, and saw two guys running in a field south of just south and east of the Roscoe exit. So the aircraft radioed the troopers on the ground and the troopers and a Keith County, Nebraska sheriff's deputy arrested the individuals

that were running through the field, determined that they were from Minnesota. And arrested them regarding the incidents that occurred the previous night. And searched them.

And at the scene of the arrest one of them had a bag of marijuana in his person and then when they were taken to the jail they found a credit card on the other one that had the name of Mike Gerard on it. It was an American Express credit card. The sheriff's deputy recognized that name and said that person resides south and east of the Roscoe exit.

So a number of State Patrol and I think maybe the sheriff's deputy as well, went to the farm where Mr. Gerard lives to contact him. And while they were there they noticed that there were two large dogs in the yard outside of the house, the farm house on the property. So they didn't go up to the door to knock on the door but they did get a phone number for Mike Gerard and called that phone

number and there was no answer.

They went to a garage that is a short distance away from the farm house. It was locked. There was a door -- there's two overhead doors that you can drive vehicles in that were locked and one door on the side for, only a person can walk through it, you couldn't get a vehicle through it, that was padlocked.

They attempted to see if there was anybody in the garage. They apparently determined they couldn't get anybody to come to the -- to open the garage. But they could hear music and they, there was a light on in the garage. So one of the troopers grabbed a ladder and climbed the ladder to attempt to look inside a vent at the roof, or at the apex of the roof, there's a vent on the wall, to see if he could see into the garage.

So when he climbed that ladder, I don't believe he was able to see into the garage because

that vent was sealed off, but that he smelled an odor of marijuana. Based on that he notified his supervisors and they went to apply for a warrant to search the residence.

It's our position that that climbing of the ladder to look into the garage was a search. And it was a warrantless search. And as such it was an illegal search. It's presumed to be illegal because there was no warrant.

The basis of the warrant, the affidavit to get the warrant, included the observations of the officer who said he climbed the ladder and smelled the odor of marijuana. If you look at the warrant, it's a warrant to look for the stolen vehicle from Minnesota, to look for another person from Minnesota and to look for marijuana or other drugs and paraphernalia and evidence of drug trafficking.

So it's our position that that warrant was

obtained on the basis of the earlier illegal search, the warrantless search. And that absent the evidence from that illegal search there would not have been a warrant issued and that the warrant was the product of the illegal search and derived from the illegal search and therefore is the fruit of the poisonous tree of the earlier illegal search and observations that were made.

And as such the warrant is invalid and the evidence that was obtained as a result of the warrant and the execution of the warrant should be inadmissible in this court. So, and we will derive the evidence that supports our position through the cross-examination of the State's witnesses.

THE COURT: All right. Mr. Gillan?

MR. GILLAN: Your Honor, I think that, that Mr. Brennan has fairly accurately set out the facts as I understand them. One thing that you need to understand, though, is that this

vehicle was in high speed chase and at night, was reportedly stolen from Minnesota.

And Minnesota told the State Patrol, in some fashion, I don't know whether it was on the phone or by teletype or computer or something, that they were two men suspected of being involved in this stolen vehicle in Minnesota. One of them, Mr., I believe his name is Delanske and the other, Shane Southard. Well, Delanske was arrested, he was one of the men seen running in the field that was apprehended. And he was with another man but that was not Southard.

And so the troopers, when they went to Mr. Gerard's farmstead, having already called and not gotten any answer, were, were looking for the stolen car, they were looking for Mr. Gerard and looking out for his welfare and they were looking for Mr. Southard. They didn't know whether Southard was involved, they don't know that he even

existed, but they were concerned that there was another person that was involved that they didn't have, they hadn't apprehended, and were concerned that he could be in either the house or the, this garage or that Mr. Gerard might be in the house or the garage.

This garage is a two story garage. From the outside you can see that it's a two story garage and that because it is so tall the trooper who could see into the garage through a window could see that there was a frame for what he believed to be a pull down stairway. And that you could see a ceiling in the garage and there was space above where the cars would be parked in this garage where someone could be hiding or there could be Mr. Gerard, Mr. Gerard's body. Who knew?

There was music playing from a radio in that garage and there was a light on and no one would answer. So whether there was anyone in there, no

one knew. The dogs were guarding the house and at least no one was answering the phone. And when they got to the farmstead they called again.

Now, first of all, if -- it's our position that taking a ladder that was found next to the garage on the ground and putting it against the wall of the garage, climbing that ladder and getting up to the vent was not a search. The trooper who did that is a drug dog handler, he has training and identification of drugs and has been involved in several marijuana arrests where he's been in the presence of lots of marijuana and he knows the smell of marijuana.

So he got up to the top of the ladder, couldn't see into the vent or couldn't see anything of interest, but he could smell the overwhelming smell of marijuana. At that point it's our position there hasn't been a search. But if there has been a search there are certainly exigent

circumstances.

No one knew that Mr. Gerard was gone, that he was out of state at the time. That information didn't come to us until after the search warrant had been issued and they were about to serve it when a man arrived and said Mr. Gerard's out of the state, I'm here to take care of the property. At that point the troopers suspected that they weren't going to find Mr. Gerard in the house. But they already had in hand a search warrant for the search of Mr. Gerard's property or Mr. Gerard, for Mr. Southard and for the stolen Camaro, as well as marijuana or other drugs and paraphernalia.

So even had that, that climbing of the ladder and the smelling of the marijuana not occurred the troopers were going to search the property. They were going to get and did get a search warrant for these other things that even if they had not smelled the marijuana they would have gotten.

After all, here is Mr. Gerard's credit card, that's in the property, in possession of a man who is suspected of being involved in this high speed chase with a stolen vehicle. How did he get it? Did he know Mr. Gerard? Did he burglarize the place, which apparently is what happened, and steal the card or did he rob Mr. Gerard of the credit card? Did he do harm to Mr. Gerard?

The troopers were there looking out for the welfare of Mr. Gerard in doing what they ought to have done. There was a ladder, it was convenient, they wanted to see into the garage and they climbed the ladder and smelled the marijuana. And we served the warrant, didn't find the car, didn't find Mr. Southard, didn't find Mr. Gerard, but found a marijuana growing operation.

So it's our position that, one, there was no search in climbing the ladder. Second of all, even if there was, and that search was illegal and not

permitted by exigent circumstances, we inevitably would have found what we found. Because the officers were going to go search the house for Mr. Gerard, for evidence of Mr. Southard or a burglary of Gerard's house. And they, they were authorized to search for those things. So in many different ways this motion ought to be denied.

THE COURT: All right. You may call your first witness.

MR. GILLAN: There is one thing that I don't think Mr. Brennan mentioned that is mentioned in his motion to suppress. And that is, one, that the warrant was not authorized to be served at any time. That is, at the, during the night. That's not the case. It was authorized at night.

But furthermore, it was not served at night. It was served at 7:15 p.m. Mountain Time, that is the local time there. And that under the federal

law is daytime because night time doesn't begin until 10:00 p.m. federally. And the state law is that it starts at 8:00 p.m. local time.

So it, it's my understanding that Mr. Brennan is going to withdraw that part of his motion.

THE COURT: Is that correct?

MR. BRENNAN: That is correct.

Paragraph 12 of the motion to suppress alleged that the warrant did not authorize a night time search. It was our position that the affidavit for the warrant didn't include sufficient information to authorize, for a court to the authorize a night time search.

The warrant did say that this warrant may be served at any time. And the evidence will be that the search commenced prior to 8:00 p.m., which is how Nebraska statute defines the beginning of night time for the purposes of the service of a search warrant.

So with regard to the motion to suppress, I will withdraw the claims made in paragraph 12 of that motion and proceed with the rest of the claims.

THE COURT: All right. Now you may call your first witness.

MR. GILLAN: Well, it's the defense motion, defense's motion. It's my understanding that there is a filing filed by the defense which contained -- I'm not sure how it's been termed or captioned. I guess there was evidence in that, regarding the motion to suppress which was filed approximately May 15th, which contained the search warrant and search warrant affidavit and return, as I understand it.

If it's in the court file I guess we would ask for the Court to take judicial notice of it. I'd like to look at whether in fact it is in the court file, however, first.

THE COURT: You may.

MR. GILLAN: Your Honor, we've looked at filing 14 in the court file and I think the easiest thing to do is to ask the Court to take judicial notice of that filing, including the search warrant, search warrant affidavit and return and inventory which were filed by defense which the government believes are true and accurate copies of those items that are relevant to this case.

THE COURT: All right. Any objection?

MR. BRENNAN: No objection.

THE COURT: All right. I will do that.

MR. GILLAN: Okay. The government calls Rick McKain.

THE COURT: Please come forward to the clerk's desk to be sworn. Here.

THE CLERK: Please state your full

name and spell your last name.

THE WITNESS: Richard D. McKain M-C-K-A-I-N.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give will be the truth to the best of your knowledge and belief?

THE WITNESS: Yes.

THE CLERK: Please have a seat.

THE COURT: Go ahead.

RICHARD McKAIN,

Called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILLAN:

Q. Mr. McKain, where you are you employed?

A. The Nebraska State Patrol.

Q. What's your rank?

A. I'm a sergeant.

Q. Where are you stationed at this time?

A. In North Platte, Nebraska.

Q. How long have you been there?

A. I've been there since 1999.

Q. Prior to that where were you stationed?

A. I was stationed in Scottsbluff, Nebraska.

Q. Were you a sergeant there?

A. Yes, I was.

Q. Prior to that where were you?

A. In Blair, Nebraska.

Q. And were you working for the drug unit there?

A. Yes, I was.

Q. And how long have you been with the Nebraska State Patrol?

A. Since November of 1978.

Q. On February 17th of 2002 did you become involved in an investigation of -- that resulted in a search warrant being served at the Michael Gerard

farmstead?

A. Yes, I did.

Q. Were you involved prior to the 17th?

A. No, I was not.

Q. Did you become involved because you are in charge of the drug unit in North Platte?

A. Yes, I did.

Q. About when did you get involved on February 17th?

A. That was mid afternoon.

Q. Okay. And were you the affiant on a search warrant?

A. Yes, I prepared the search warrant.

Q. In preparing that search warrant and preparing to serve that search warrant did you talk to a number of other investigators and read reports and teletypes and that sort of thing?

A. Yes, I did.

Q. On February 16th of 2002 did you discover that

there had been a, or in the early morning of the 17th, that there had been a high speed chase?

A. Yes, I did.

Q. About when did that occur?

A. When did the chase occur? Or when did I --

Q. Yes. When did the chase occur?

A. Without looking at the --

Q. Well, was it in the nighttime?

A. Early morning hours, yeah.

Q. Okay. Did you get involved in communicating with Minnesota about a stolen vehicle?

A. I don't believe I spoke with anybody by phone or anything. But I did see the teletypes.

Q. Okay. And based on the teletypes what did you discover?

A. That there was a vehicle stolen out of Minnesota and that there were three individuals that were, that they were looking at as being involved with that.

Q. And did you get names of those individuals?

A. Those are on the teletype.

Q. And do you remember what their names were?

A. Not without looking.

Q. Okay. Would you take a look?

A. Shane Southard, and an individual by the name of Delanske. I believe those are the only names I had at the time.

Q. Okay. And that information came from Minnesota?

A. It came from a teletype sent to our office at North Platte from Rochester.

Q. That these two named individuals were suspected of being involved in a --

A. In a stolen vehicle.

Q. And did you have the license number of that stolen vehicle? Did they provide it to you?

A. It's on, it's on the teletype.

Q. And had that vehicle been involved or a

vehicle with that license plate, any way, been involved in a chase in the middle of the night?

A. It was involved in a chase in Nebraska in the middle of the night.

Q. Okay. By the Nebraska state -- involving the Nebraska state troopers?

A. That's what I was told, yes.

Q. Okay. And, and what did you learn about that chase?

A. That they had lost the vehicle south of Roscoe in the county.

Q. Roscoe, Nebraska?

A. Yes.

Q. And generally where is that?

A. It's going to be east of Ogallala, 15, 20 miles.

Q. Some place between North Platte and Ogallala?

A. It may not be that far, yeah.

Q. Between North Platte and Ogallala?

A. That's correct.

Q. All right. And when you became involved had they apprehended anybody?

A. They had apprehended two individuals.

Q. Did they give you their names?

A. I received the, what they call an IOR, which is a number generated when an incident takes place and it had two individuals names on it. Plus they had also told me who the individuals were.

Q. And what two individuals were you told had been apprehended?

A. I believe a Delanske and a Mertins.

Q. The Delanske matched the name on the teletype from Minnesota?

A. That's correct.

Q. The Mertins name was new, is that correct?

A. That's correct.

Q. You had a name for another individual, Shane Southard?

A. That's correct.

Q. Was there any information that a third person was involved when these two were apprehended?

A. There was a feeling from the troopers and in Minnesota that there was possibly a third person involved, or this, obviously Shane Southard was still there.

Q. At least you didn't know where he was?

A. No.

Q. And there was no indication that they were, they had on the 17th chased three people?

A. Not that I'm aware of.

Q. Okay. They just found two guys in a field and arrested them?

A. That's correct.

Q. Were you told about a search of Mr. Mertins?

A. I was told what was located on that person, yes.

Q. And what were you told as located on him?

A. There was -- directly on him?

Q. Well, in his possession.

A. There was a credit card found and there was a bag of marijuana found. At this time I don't remember which one, who had possession of which one.

Q. You were told that these two men that were found near the Roscoe interchange had this evidence, had this property on them?

A. That's correct.

Q. Okay. And what did you know about the credit card?

A. The name on it.

Q. And --

A. Which was Mr. Gerard's.

Q. Michael Gerard?

A. That's correct.

Q. Had you ever heard that name before?

A. Not that I remember.

Q. Okay. At that point this was a --

A. A new name to me.

Q. Okay. Did officers attempt to figure out who Mr. Gerard was?

A. Yes.

Q. When did they do that?

A. I think after they arrested the two individuals, they found the credit card and marijuana, then one of the deputies, I believe, knew of Mr. Gerard and where he lived.

Q. Okay.

A. I was informed that they went out and tried to contact him.

Q. All right. And you then got information as of the middle of the afternoon of the 17th, is that right?

A. That's correct.

Q. And what information did you have about Mr. Gerard at that point?

A. There at the phone call?

Q. When, yeah, okay.

A. I was just advised that they had no contact with him, that they'd gone to his residence and tried to contact somebody at the residence. Initially I was told that someone picked up the telephone in the residence and would not speak and then hung it up. I believe we later determined that was an answering machine.

Q. Okay. All right. So they --

A. And then that they had also attempted to enter the residence but were concerned about two large dogs that were near the residence. Just from a visual search they couldn't tell that anything had been broken into on the residence. And that they had also heard music coming from a barn or a garage area that was two stories.

And that in attempting to determine if anything was in that building Trooper Crymble had

climbed a ladder and had attempted to look through a venting system to see what was in the second story. And at that time he had smelled the strong odor of marijuana.

Q. Okay. So you began the process of applying for a search warrant, is that right?

A. That's correct.

Q. At that point what were you trying to investigate?

A. We were trying to determine, number one, where Mr. Gerard was at and whether he had any ties to the individuals that were in possession of his credit card. Because we weren't sure how they had obtained that credit card.

And so I was in the process of trying to determine that, as well as prepare the affidavit for the search warrant to look for the third individual, Mr. Southard, a vehicle and also to find out what the odor of marijuana was.

Q. Okay. Did you know where Mr. Gerard was when you started this process?

A. I did not.

Q. Did you have fears about where Mr. Gerard was?

A. We were concerned as to what was transpiring. We had no idea what was -- we assumed somebody was on the property.

Q. Okay. What was the basis of that assumption?

A. Like I said originally, they thought someone picked the telephone up and then hung it up.

Q. Okay.

A. So they felt that there was somebody there. They being the troopers on the scene and the deputies.

Q. At that time you began this process of applying for a search warrant were there law enforcement officers on the property?

A. Yes.

Q. And how long had they been there, did you

know?

A. I don't believe I know how long. When they actually got there.

Q. Okay. But was it your impression that they, at least one trooper or law enforcement officer who went there in the morning was still there when you started this process?

A. Yes, someone stayed on the property from the first time they got there is my understanding.

Q. You were told that they were dogs that they were concerned about that were on the property preventing them from going to the door?

A. Right.

Q. Did you eventually go there to serve the search warrant?

A. Yes, I did.

Q. Did you see those dogs?

A. Yes.

Q. Can you describe those dogs?

A. They were two large Rottweilers, probably in the area of 150 pounds apiece, maybe larger.

Q. Okay. Were these menacing dogs?

A. They looked menacing. We did not have any problems with them.

Q. Okay.

A. We did not try and go on the property while the dogs were loose, though.

Q. Okay. Now --

A. We weren't able to.

Q. Can you describe the, you were there later, can you describe the property and where these dogs were?

A. There was a fenced in area surrounding the residence. The fence led clear down and around the property and then around, I believe what was at one time maybe still was a chicken coop or a storage area that allowed entrance into this chicken coop for the dogs.

Q. Okay. Did the fence surround the garage?

A. No.

Q. So you could go to the garage without the dogs bothering you but the dogs were inside the fence surrounding the residence?

A. That's correct.

Q. All right. So you put together the information that you had about the Gerard credit card, the vehicle that was reportedly stolen from Minnesota, and the search of the Gerard residence, is that right?

A. That's correct.

Q. You drafted the warrant and the affidavit?

A. That's correct.

Q. And did you take them to a judge?

A. Yes, I did. I hand carried them to Judge Turnbull.

Q. And where did you meet with him?

A. At his church.

Q. Did you swear to the affidavit --

A. Yes, I did.

Q. -- in front of him?

A. Yes, I did.

Q. Did you watch him read the affidavit?

A. Yes, I did.

Q. Did you see him sign the search warrant?

A. Yes, I did.

Q. About when was that?

A. I would guess that that was probably close to between 1830 and 1900 Central Time.

Q. Central Time?

A. Yes.

Q. Okay.

A. Which would have been 16 -- or 1800 Mountain Time.

Q. Okay. 6:00 p.m. Mountain Time?

A. Yes. I'm sorry, would have been 6:00 p.m., between 6:30 and 7:00 Central Time and then that

would be 5:30 to 6:00 Mountain Time.

Q. Okay. And were you in Central Time?

A. We were in Central Time and then moved to Mountain Time.

Q. Okay. You were in Central Time with judge -- the judge?

A. That's correct.

Q. And you went into Mountain Time to serve the warrant?

A. That's correct.

Q. Okay. Did the judge who signed this appear to be acting as a neutral and detached magistrate when he did so?

A. Yes, he did.

Q. Did he appear to be sober?

A. Yes.

Q. Did he appear to have been awake?

A. Yes.

Q. Did you believe that you had probable cause to

search this residence?

A. Yes, I did.

Q. Did you believe that the affidavit stated probable cause?

A. Yes, I did.

Q. After he signed that search warrant what did you do?

A. We then took, myself and another officer then transported this -- we advised the officers that were on the scene as well as officers that were parked shortly, or a short distance away that the, it had been signed and that we were en route. So then we immediately drove to the Roscoe area.

Q. How long did that take you?

A. 45 minutes.

Q. What time did you arrive?

A. We actually got on the property some time after 7:00, 7:10, 7:15, somewhere in that area.

Q. Mountain Time?

A. Yes.

Q. When you arrived what was, what did you find, what was going on on the farmstead that you could see?

A. When we actually arrived at the farmstead there was a trooper on station on the property, standing just in front of his patrol car where he could view the surrounding area.

Q. Was there a, another person there?

A. No, there was not at that time.

Q. Okay. And who was that trooper, do you know? From the look on your face you do not know.

A. His name just escaped me, I'm sorry.

Q. Was this a uniformed officer?

A. Yes, it's a uniformed officer stationed in Ogallala.

Q. Did you talk with him?

A. Yes, I did. He came over to my patrol unit shortly thereafter and spoke with me.

Q. What did he tell you?

A. He indicated that an individual had shown up at the property indicating that he was there to feed the animals. Indicated the individual's name was Ronald G. Smith. And that Mr. Smith had indicated to him that Mr. Gerard was out of town. And I believe he said that he was at Hawaii.

Q. All right. But Mr. Smith then had apparently left before you got there?

A. Yes, he did.

Q. Okay. At that point did you believe that you had probable cause to serve the search warrant for marijuana and other drug related items as well as for Mr. Southard?

A. We believed everything in the warrant was still valid. We weren't sure that Mr. Gerard still wasn't there. We didn't, I mean, Mr., we didn't know who Mr. Smith was, to be honest with you, at that time.

Q. Okay.

A. We just had his statement that they weren't there.

Q. Okay. I take it shortly thereafter you began serving the search warrant?

A. We began trying to secure the dogs so that they were not a problem to anyone.

Q. Okay. And about what time did that start?

A. Just about right then. The guys were already working on it when I was talking to the trooper, the other investigators were already working on them.

Q. So this was after 7:00 p.m. Mountain Time?

A. That's correct.

Q. Was it before 8:00 p.m. Mountain Time?

A. Yes.

Q. How long did this search take?

A. Several hours.

Q. Okay. And it was completed approximately

when?

A. Looks like probably some place in the area of 11:00, 2300 hours, 11:00 p.m., somewhere in there.

Q. Mountain Time?

A. Yes.

Q. And it went on continuously from the time it began until it was completed some time --

A. That's correct.

Q. -- around 11:00 p.m.?

A. That's correct.

Q. And then the place was secured and every --

A. As best we could secure it, yes.

Q. And the law enforcement officers left?

A. That's correct.

Q. And you left with them?

A. That's correct.

Q. When you left did you believe that you had had probable -- that you had had probable cause to do the search that you did?

A. Yes.

Q. And did you believe that the warrant was, was valid?

A. Yes.

Q. What did you find in the garage?

A. I'm sorry?

Q. What did you find in the garage?

A. In the garage, once it was opened up, there was like a small radio playing. There was a light on in there. There was a heating unit, I believe. And then in, a large amount of potting soil. In pulling down the stairs going up, I didn't see actually how they got in the attic, I wasn't, they cleared the building first before I went in --

(End side 1 of tape 108.)

-- come back at that time. We go through and we clear everything first to make sure that there are the nobody there that's going to surprise us or harm us or that we're going harm before we ever

start searching.

Q. Okay.

A. And once that was done, like I said, I looked in the basement or in the bottom part. There was a motorcycle, I believe, in there, some car parts, potting soil, pots for plants.

We went upstairs and there was a, two rooms, if I'm not mistaken, upstairs, with grow lights, which would be large halogen lights for plant growing. There was marijuana growing in both rooms. Different sizes. Some little bigger than the others.

In the largest of the two rooms there was a huge grow light, 7 feet across, maybe 8 feet across, with one large bulb in there. There were timers and there was liquid, looks like either water to or maybe liquid fertilizer and water mixed together. I really wasn't sure what that was.

MR. GILLAN: Okay. I don't think I

have any other questions, Your Honor.

THE COURT: All right.

Cross-examination?

MR. BRENNAN: Thank you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q. In order for you to be --

A. Could you speak up just a little bit, please?

Q. Yes.

THE COURT: Pull the microphone over closer to you.

Q. (By Mr. Brennan) In order for you to be the affiant you had to be familiar with the investigation?

A. That's correct.

Q. And you were familiar with the investigation?

A. I was able, I was talking to Trooper Crymble and Trooper Whetstine over the telephone. They were in Ogallala, I was in North Platte.

THE COURT: Excuse me. Now I have to ask the witness to pull the microphone over that way or turn yourself, one or the other. Thank you.

A. I was on the telephone to Trooper Crymble and Trooper Whetstine. They were at the Ogallala office, the State Patrol office or the sheriff's office and I was at the North Platte office.

Q. (By Mr. Brennan) Okay. So your sources of information were Trooper Crymble and Trooper Whetstine?

A. Yes.

Q. Is it Whetstine, S-T-I-N-E?

A. Yes.

Q. And they gave you the a report of the events of the evening of February 16th and the morning of February 17th?

A. That's correct.

Q. And so that you knew that there had been this

pursuit on the night of February 16th?

A. That's correct.

Q. And the pursuit involved Trooper Whetstine and on the another trooper?

A. There were other troopers involved, yes.

Q. And that occurred approximately 10:00 p.m.?

A. I don't recall the time.

Q. And you were aware that Trooper Whetstine was chasing a blue Camaro with Minnesota license plates?

A. That's correct.

Q. And that he observed two occupants in that vehicle?

A. I believe that's what he told me, yes.

Q. And that he noted that the driver of the vehicle was wearing a bandanna?

A. That I don't recall.

Q. But you have seen his report of that pursuit and the printout of the radio traffic that

coincided with the pursuit?

A. Are you looking at the affidavit or the radio?

Q. I'm looking at the document which I assume you have called south central broadcast.

A. Can you --

MR. BRENNAN: May I approach the witness?

THE COURT: Yes.

Q. (By Mr. Brennan) I'm showing you a document and at the top left-hand corner it says south central broadcast, is that correct?

A. That would be this one?

Q. Yes. That's the one.

A. Okay.

Q. That describes the vehicle pursuit that Trooper Whetstine was involved in.

A. Okay.

Q. Is that right?

A. That's correct.

Q. And that information would come then from Trooper Whetstine, wouldn't it?

A. I probably got this from our radio, radio room. They probably printed me a copy out. It probably didn't come directly. Or you mean this little paragraph right here?

Q. Yeah.

A. That probably originally came to me, yes, I'm sorry.

Q. So this would have been how he described it when he was actually involved in the pursuit?

A. Yes. That was probably just after it occurred.

Q. And so his description was that the vehicle was occupied by two subjects, driver wearing a bandanna?

A. That's what it says on there, yes.

Q. And that the reason for the traffic stop was

failure to dim auxiliary lights?

A. That's what it says on there, yes.

Q. So he never indicated that he observed more than two people in the vehicle?

A. I don't, I don't recall that he did, no.

Q. And none of the other sources of information indicated that there were more than two people in the vehicle on the night of February 16th?

A. Not that I have right in front of me.

Q. And you were made aware that on the morning of February 17th around 10:00 a.m., two people were arrested?

A. I was made aware of that information, yes.

Q. And they were identified as two young men from the state of Minnesota?

A. That's correct.

Q. And no one had ever reported that there were three people that morning as well?

A. That's correct.

Q. You were aware that on the night of February 16th that a number of law enforcement officers were involved in the search for the blue Camaro after Trooper Whetstine lost it south of Roscoe?

A. That would be an assumption. I don't know that they ever told me how many were -- I knew several of our troopers were but I don't know how many other law enforcement agencies or officers were.

Q. They told you that the State Patrol aircraft was involved?

A. I believe the next day. I don't know that I knew that they were involved that night.

Q. Okay. But the next day --

A. During the day.

Q. -- when you were applying for the warrant you knew that the State Patrol aircraft had been involved in the search the night before?

A. No. During the day. I don't know that I ever

knew that they were the night before.

Q. Do you know that now?

A. If you're telling me that.

Q. You've read the officers' reports regarding this incident?

A. No. I talked to the officer and his reports -- (indiscernible.)

Q. You've never read the reports?

A. I don't believe so, no.

Q. When you spoke with Trooper Whetstine did he tell you that he wrote a report regarding the February 16th pursuit?

A. Are you talking about when I talked to him on that Sunday? Or are you talking about later on?

Q. Well, have you ever talked to him about his report of the February 16th pursuit?

A. No, I did not.

Q. So you don't know what happened the night of February 16th during the pursuit?

A. Just from what he told me that day.

Q. And he did not tell you that the pursuit involved an extensive search with aircraft that night?

A. I believe that I knew that they had the aircraft out that morning. I'm not sure that I knew that they had it out the night before. I don't remember anybody telling me that the night before.

Q. You do know that the blue Camaro was found?

A. Yes. If I'm not mistaken it was found maybe the next day afterward, maybe like on the 18th.

Q. And it had been torched?

A. That's correct.

Q. It was found in a field about a hundred miles, or a hundred yards east of a minimum maintenance road about two miles south of Roscoe exit?

A. I know it was in that general area. I never did go where it was at or --

Q. You knew that on the morning of February 17th when they arrested the two men in the field just south of I-80 and just east of the exit that they believed those two men were the same two that had been pursued by Trooper Whetstine the night before?

MR. GILLAN: Objection, foundation and relevance.

THE COURT: Sustained on relevance. I don't need to know that.

Q. (By Mr. Brennan) You were aware that Trooper Whetstine observed two people in the vehicle the night before?

A. I believe that's what he told me, yes.

Q. And that two people were arrested the following morning?

A. That's correct.

Q. And they were from Minnesota?

A. That's correct.

Q. And the car that was pursued the night before

had Minnesota plates?

A. That's correct.

Q. You also were aware that the two men who were arrested in the field were taken to the Keith County sheriff's office?

A. I believe that's where I was talking to them, yeah.

Q. And that they had questioned those two men?

A. I believe they, I believe they tried to talk to them. I'm not sure what they -- that they ever talked to them. That they ever were cooperative.

Q. Okay. So the two men that were arrested never made any statements regarding any connection with the credit card?

MR. GILLAN: Objection to the form of that question. I don't see the relevance of whether they've ever said.

THE COURT: Overruled. You may answer if you know.

A. Could you repeat it?

Q. (By Mr. Brennan) The two, neither of the two men who were arrested ever made any statements to the arresting officers or any other law enforcement officers regarding the credit card?

A. Not that I'm aware of.

Q. Or where it came from?

A. Not that I'm aware of.

Q. Or whether they knew Mr. Gerard?

A. Not that I'm aware of.

Q. Or whether they had ever been at the farm where Mr. Gerard resided?

A. Not that I'm aware of.

Q. Or whether there had ever been a third person with them?

A. Not that I'm aware of.

Q. Or what happened to the Camaro?

A. We did not know what happened to the Camaro.

Q. We're talking about whether these two men who

were arrested said anything about the Camaro.

A. Right. They didn't tell us.

Q. The two men who were arrested were suspected of having burned the Camaro, isn't that right?

MR. GILLAN: Objection as to the time and foundation.

THE COURT: Sustained on foundation.

Q. (By Mr. Brennan) You know the Camaro was found?

A. That's correct.

Q. And you know it was found after they were arrested?

A. That's correct.

Q. And you believe that they were the occupants of the vehicle on February 16th?

MR. GILLAN: Objection to the relevance of what he believes now.

THE COURT: Sustained.

Q. (By Mr. Brennan) You believed it then?

MR. GILLAN: Objection as to when.

Q. (By Mr. Brennan) On February 17th when you were informed of the events of February 16th.

A. The vehicle wasn't found, I don't believe, until 18th or 19th. So I didn't know that it had been burned until they found it. So -- I believe at least one of those parties was in that vehicle. I don't know that the other one was.

Q. You knew that they had been arrested because they were suspected of having stolen the blue Camaro from the state of Minnesota?

A. No, I was under the assumption that they were arrested because they stole another vehicle in Nebraska.

Q. The pickup from the farmer?

A. I believe so, yes.

Q. And you knew that that morning when they were being sought because of the attempt to steal the pickup that the law enforcement officers who were

involved in that pursuit believed them to be the same subjects that were pursued the night before by Trooper Whetstine?

MR. GILLAN: Objection as to relevance.

THE COURT: I don't know that I need to know that. Can you explain to me how it connects?

MR. BRENNAN: Yes, Your Honor. We know from Mr. Gillan's opening statement that the State is going to claim that the law enforcement officers' entrance to the property without a warrant was because they were claiming to be looking for someone else, some third person.

And it's apparent from the information that's been provided that there were two people seen the night before, two people seen the following morning and that the law enforcement officers believed they were the same two people on both occasions.

THE COURT: All right. I'll let him answer. If you know.

THE WITNESS: Could you repeat it now? I'm sorry.

THE COURT: Yes.

Q. (By Mr. Brennan) The following morning on February 17th, the law enforcement officers were involved in apprehending the suspects who had attempted to steal the farmer's pickup, believed that those were the same two men who had been chased by Trooper Whetstine the night before?

MR. GILLAN: Objection as to when they believed this.

THE COURT: Overruled. You may answer.

A. I don't know.

MR. BRENNAN: May I approach the witness, please?

THE COURT: Yes.

A. I think I'm looking at the same thing you are.

Q. (By Mr. Brennan) Do you have this teletype?

A. Exactly.

Q. You've got that in front of you here?

A. Exactly.

Q. Okay. This is information that was provided to you by the --

A. Yes, sir.

Q. -- officers involved?

A. No, dispatchers.

Q. By the dispatchers?

A. Dispatcher does this.

Q. This is printed out from the officers on the radio traffic as they're involved in it?

A. But I don't have a copy of this. This here is usually just a synopsis that's written down by the dispatcher and doesn't necessarily reflect exactly what the traffic might be on the radio.

And more than, without making assumption, because we have two people when they write this -- cause they start writing this as soon as they get a call. Does that make sense? As soon as they receive a call from something they start writing it.

Q. Based on what they hear over the radio?

A. Right. What they're told. And so they may have started writing this and somebody said this may be the two individuals from last night.

Q. In fact what they wrote is same subjects?

A. Believed may be the same subjects.

Q. So that's what they believed?

A. Yeah.

Q. They believed it was the same subjects as the night before?

A. That's what it says.

Q. You were aware that the lady who called the sheriff's office to report the theft of the pickup

only saw two people?

A. That's what I was told, yes.

Q. You were aware that a sheriff's deputy talked to another farmer who said two men came up to him and wanted him to give them a ride?

A. That's what I was told, yes.

Q. And he never said that he saw more than two people?

A. Not that I'm aware of.

Q. And you were aware that when the state of Minnesota was contacted they reported that the theft was committed by two people?

A. And provided names, yes.

Q. They never said three people were involved?

A. I don't -- not according to that teletype.

Q. The two men that were arrested were never charged with burglarizing the farm?

MR. GILLAN: Objection as to relevant.

THE COURT: Sustained.

Q. (By Mr. Brennan) And when you were at the farm you saw no evidence that the farm had been burglarized?

MR. GILLAN: Objection, relevance.

THE COURT: Sustained.

Q. (By Mr. Brennan) Did you see any evidence that there had been a forced entry prior to the execution of the search warrant?

MR. GILLAN: Objection, relevance.

THE COURT: Sustained.

MR. BRENNAN: May I be heard, please?

THE COURT: Yes.

MR. BRENNAN: We know from Mr. Gillan's opening statements that the State's going to claim that they had reason to believe that the entrance on to the property was justified because they suspected that the two men who had been arrested had been in the residence, either to associate with Mr. Gerard or to commit a burglary

and take the credit card and whatever else they could find in the residence. And that that was one of the justifications for the entry on to the property by law enforcement officers. I believe that it's relevant to have the Court know that there wasn't any indication of that when they got there.

THE COURT: That may be true. But there's nothing about that in the application for the warrant itself. And that was what he was saying is that the warrant would have been issued as for a search for the property for the Camaro and other people in the event that I find that this was a search when Crymble went up on the roof. That's the argument. I think that I can answer that argument by looking at the affidavit.

MR. BRENNAN: It would be our position, Your Honor, that the entry on to the property prior to the preparation of the affidavit

and obtaining the warrant is the subject matter of our motion to suppress. That that was unlawful entry and constituted an illegal search, and the claims that the government makes that attempt to justify the entry on to the property are relevant in assessing whether those claims are credible.

THE COURT: Well, let me ask you this. Is it your argument that they had no reasonable suspicion to inquire of Mr. Gerard, if they could find him, about anything on the credit card?

MR. BRENNAN: No. I believe that if they could have contacted Mr. Gerard they would have been able to, if he consented to a communication or a conversation with them, would have been able to ask him questions about why these guys had his credit card. But that's not what happened. When they got on the property --

THE COURT: Well, I understand that.

But we're talking about -- I mean, is it your position that they shouldn't have gone to his house to talk to him?

MR. BRENNAN: No, that is not my position.

THE COURT: Okay. So they're in the driveway or wherever they are on the farmstead, why do I have to know anything about a burglary?

MR. BRENNAN: Well, because they're using that information as the basis, for, number one, their information in their affidavit to get a warrant and as the basis for deciding that it's necessary to get a ladder to climb up and peek in through the vent to the garage.

THE COURT: Well, but that's different, the using of the ladder is a whole separate set of actions. The entry into the driveway of the farmstead is something that seems to me that they would have done in any event to try

to find Mr. Gerard and ask him about the credit card.

MR. BRENNAN: Okay. Well, let me just -- and then I'll sit down. But I just would like to stress that the reasonableness of getting the ladder to look into the vent is, it's relevant as to what they observed when they looked at the farm house. He said they looked at the farm house before they climbed the ladder to look through the vent.

And if they made no observations of that there had ever been a forced entry to the farm house that affects the reasonableness of the necessity to get the ladder to climb up and peek through the vent.

THE COURT: All right. You can inquire as to that.

MR. BRENNAN: Okay. Thank you.

Q. (By Mr. Brennan) The question is were you told that there was, prior to Trooper Crymble getting

the ladder and looking into the vent or attempting to look through the vent, that they had noticed any indication that there had been any burglary or forced entry into the residence?

A. As I stated earlier, as I stated earlier when we got there originally there was no indication, no broken windows or anything like that.

Q. So what you observed when you got there was the same thing that those other officers observed before they looked through the vent?

A. That's correct.

Q. You saw the garage?

A. That's correct.

Q. And you could see that the garage had two overhead doors on the south wall?

A. That's correct.

Q. And one sliding door large enough for a person to walk through on the west wall?

A. I didn't remember it was sliding door but

there was a door on the west wall. That's the one that was padlocked?

Q. Yes. You noted that that door was padlocked when you saw it?

A. I -- I believe that they had already done their sweep before I saw the door. I don't believe it was still padlocked when I saw it.

Q. Well, then they told you that it was padlocked?

A. That's correct.

Q. And the overhead doors had windows across both doors?

A. You could see into the building, yes.

Q. So that it was easy for someone to look into the garage to see whether there was a Camaro or some other vehicle in there?

A. On the bottom floor, yes. For the car.

Q. It wouldn't be a car upstairs, would there?

A. No, sir.

Q. And you knew that there was no Camaro in the garage?

A. No.

Q. And no Camaro anywhere on the farm ground that was visible to anybody?

A. We did not find the Camaro any place on the farm property.

Q. Yeah, I know that.

A. Okay.

Q. Before --

A. You have to understand, there's trees and everything else. I mean, there's -- we're doing it systematically. Could have been any place on there. So to be, I'm telling you as a whole we did not find it. To tell you exactly when I, when I can say we knew it wasn't there, I can't do that.

MR. BRENNAN: May I have an exhibit marked, please?

THE COURT: Yes.

MR. BRENNAN: May I approach the witness?

THE COURT: Yes.

Q. (By Mr. Brennan) Sergeant McKain, I'm showing you what's been marked for identification as Exhibit 101, is that correct?

A. That's correct, yes.

Q. Does that appear to be an aerial photograph of the farm that was the subject matter of the warrant that was executed on February 17th, 2002?

A. Looks a lot different on the ground in the dark. I mean, this is the garage, and this was the little chicken coop building or whatever. But I'm not sure when this picture was taken. Cause I don't see a fence around here and there was a fence around this building.

Q. Okay.

A. So I don't know when this picture was taken. And it seemed to me at that time the foliage was

much denser all the way around it.

Q. Well, actually the search was conducted in February, right?

A. Yeah.

Q. So there wouldn't have been any leaves on the trees, right?

A. I'm just talking about the trees and everything else. The, there's evergreens, okay, fir trees and those don't change. But just trees and everything themselves looked much, much denser at that time. But --

Q. That looks like the garage right there?

A. Yes.

Q. You don't have any question that that's the garage that was searched? I mean you --

A. I mean, that's what it looks like, yes.

Q. If somebody were to tell you this is a photograph of that farm you wouldn't argue with that, would you?

A. It appears to be the farm, yes. That's what I'm --

Q. That would be the house right behind the garage there?

A. It looks like it.

Q. And the dogs were somewhere near the house?

A. All the way around it. Like I said, there was a fence all the way around the mouse. And then came out around the building here. And I believe it connected to this side of the building. Maybe even a little bit in. But it's on the other side as well. We couldn't get within 15 yards of the front door from the fence. That's just an estimate. Without getting in with the dogs.

Q. But you were able to do that without any trouble?

A. Once we got the dogs secured, yes, we did that.

Q. I believe you said that when you proceed to

execute the warrant you really didn't have any trouble with the dogs?

A. After we got them put away.

Q. It wasn't that difficult to do?

A. The one tried to bite me after we got them in the kennel. Up until then they weren't too bad.

MR. BRENNAN: I would offer Exhibit 1.

MR. GILLAN: Counsel is --

MR. BRENNAN: Mr. Gillan won't have any objection if I inform the Court that the photograph depicts the farm and includes all of the buildings and structures that were on it at the time that the search warrant was executed.

THE COURT: Is that correct?

MR. GILLAN: Yes. If counsel represents this to be the Gerard farmstead that we're talking about, I don't object. I think it would be useful to the Court.

THE COURT: It's received.

Q. (By Mr. Brennan) You knew that they had attempted to telephone the Gerard residence and you included that information in your affidavit for a warrant?

A. I was told they tried to call the phone, yes.

Q. And I think you today said that you believe that they may have told you that they heard a click and learned later that that was an answering machine?

A. While I was talking to them on the cell phone while they were there they said that someone had picked up the phone and did not answer them.

Q. You know that's not mentioned in any of their reports?

A. No, I don't.

Q. Have you read their reports?

A. No.

Q. You never --

A. That's a different investigation.

Q. Excuse me?

A. They were working on the stolen cars and everything else. Once it was determined the stolen cars and stuff were not there I did the drug investigative work, they did the work on the other one.

Q. I'm talking about the investigation and the attempt to contact Mr. Gerard, you've read those reports?

A. No. I have not. I read my own reports.

Q. Well, that would include the report by Officer Crymble that has your name at the top right corner, doesn't it?

A. That's just because that goes with my case file. I have not read that I don't believe. I don't think I even got a copy of it in my book here.

MR. BRENNAN: May I approach the witness, please?

THE COURT: Yes.

Q. (By Mr. Brennan) Are you looking in your book to see?

A. I'm looking in all the reports that I have in my possession and I don't believe I have that one.

Q. This is information from Officer Crymble, is that right?

A. That's correct.

Q. And he was one of the two officers that you spoke with on the telephone when you were in North Platte --

A. That's correct.

Q. -- and he was in Ogallala?

A. That's correct.

Q. In his report he says attempts were made to contact Gerard by telephone but no answer was received in the residence.

A. Oh.

Q. Is that right?

A. That's what it says there.

Q. He didn't say anything in his report about there being a click and it sounded like somebody hung up. Isn't that right?

A. That is not in his report.

Q. This is your affidavit.

A. Go ahead.

Q. It is?

A. That's correct, yes.

Q. And this is what you presented to the court based on the information provided to you by Trooper Whetstine and Trooper Crymble?

A. That's correct.

Q. And in here you stated that you were advised by Trooper Crymble that attempts were made to contact Gerard by telephone but no one answered in the residence?

A. What I said was they thought that someone picked up the phone but did not talk to them.

Q. My question is in this affidavit your statement was that attempts were made to contact Gerard by telephone but no one answered?

MR. GILLAN: Your Honor, I object to this line of questioning as argumentative and it's not relevant to this inquiry.

THE COURT: I don't think you need to go into this. I've got the affidavit and I think I can judge it there.

MR. BRENNAN: Thank you.

Q. (By Mr. Brennan) Did you ever see an answering machine in the residence?

MR. GILLAN: Objection, relevance.

THE COURT: Sustained.

Q. (By Mr. Brennan) It was clear that no one was there?

A. We found no one on the property.

Q. That includes the garage as well as the residence?

A. That's correct.

Q. Did you ever note a mail box to the residence out on the road?

MR. GILLAN: Objection, relevance.

THE COURT: Sustained.

MR. BRENNAN: Those are all my questions.

THE COURT: All right. Redirect?

REDIRECT EXAMINATION

BY MR. GILLAN:

Q. You were asked it was clear that no one was there, I take it that that question meant at the time that you arrived at the farmstead. Was it, did you know whether anyone was there?

A. No, we did not.

Q. There are several out buildings on this property, is that correct?

A. That's correct.

Q. Did you go to any of those out buildings?

A. I walked through most of them, yes, myself.

Q. Were there places in those out buildings where a car could have been?

A. Yes, there was.

Q. Were some of those places inside out buildings in which a car could have been that you could not tell whether there was a car in that building from the outside?

A. That's correct.

Q. With regard to the stolen pickup from the farmer that was spoken of earlier, you recall that?

A. Yes.

Q. Was there a report by a farmer in the general vicinity of Mr. Gerard's farm that a pickup was being stolen?

A. Yes.

Q. And was that on the morning of February 17th, 2002?

A. Yes.

Q. And it was after that that officers began searching the fields for two men?

A. That's correct. They may have been looking for them prior to that when we got the first initial call on the tractor. I don't know exactly when they started looking again.

Q. Was this pickup stolen, driven off any way?

A. I don't know the answer to that.

MR. GILLAN: Okay. I don't have any other questions, Your Honor.

THE COURT: I have no questions. You may step down. Your next witness?

MR. GILLAN: Trooper Crymble.

THE COURT: Please come forward to the clerk's desk to be sworn.

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: Jeff Crymble, C-R-Y-M-B-L-E.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give will be the truth to the best of your knowledge and belief?

THE WITNESS: Yes, I do.

THE CLERK: Please have a seat.

DIRECT EXAMINATION

BY MR. GILLAN:

Q. Trooper, where do you work?

A. The Nebraska State Patrol.

Q. How long have you been there?

A. Since 1995.

Q. And what do you do?

A. I'm assigned to the road, also K-9 division.

Q. Okay. You normally wear the uniform much like you're wearing today?

A. I don't, no.

Q. You do not?

A. No, sir.

Q. Okay. You do have a uniform that you wear, however?

A. Yes, sir.

Q. Okay. You are a dog handler?

A. Yes, sir.

Q. What kind of a dog do you have?

A. It's a Belgian Malinois.

Q. And is it trained to, to provide service to the State Patrol?

A. Yes, it is.

Q. And what services does your dog provide?

A. He's an apprehension, tracking, as well as narcotic dog.

Q. And you are his only handler?

A. Yes, I am.

Q. How long have you had that dog?

A. Approximately two years.

Q. And when you say an apprehension tracking dog, what does that mean?

A. That's actually two different functions. He does all scent work, which is tracking, evidence recovery, as well as bite work would be apprehension.

Q. Okay. Bite work meaning what?

A. To apprehend a bad guy.

Q. Okay. And he will go bite a bad guy that you're trying to apprehend?

A. Yes, he will.

Q. Okay. Have you received a training in the identification of illegal narcotics?

A. Yes, I have.

Q. Have you received training in identification of marijuana?

A. Yes, sir.

Q. Are you familiar with the odor of marijuana?

A. Yes, I am.

Q. And how are you familiar with that?

A. Through our training, I've seen it, as well as

smelled it.

Q. Okay. Have you been involved in seizing large quantities of marijuana?

A. Yes, I have.

Q. How, about how many have you been involved with involving 50 pounds or more?

A. My personal cases is probably around five.

Q. All right. And have you also been involved in cases handled by other state troopers?

A. Yes, sir.

Q. Have you been in close proximity to large quantities of marijuana involving other troopers' cases?

A. Yes, I have.

Q. About how many times?

A. I'd estimate five also.

Q. Are you, are you familiar with the odor of burning marijuana?

A. Yes, I am.

Q. And is that a different odor than the odor of, that marijuana gives off when it is not burning?

A. Yes, it is.

Q. And do you have -- have you had intensive training with your dog in regard to the uncovering marijuana?

A. Yes, sir.

Q. How often do you train with your dog in regard to narcotics?

A. Officially once a week. But every day. It's ongoing work.

Q. Do you use marijuana in that training with your dog?

A. Yes, I do.

Q. Do you have marijuana for that purpose?

A. Yes, I do.

Q. How often per week do you use that marijuana? Maybe I better ask that a slightly different way. How, how many times per week on average do you take

1 the marijuana that you have and train your dog?

2 A. Once a day.

3 Q. Okay. And so can you smell that marijuana

4 when you're handling it with your dog?

5 A. Yes, I can.

6 Q. So every day you work with your dog you smell

7 the odor of marijuana that is not burning, is that

8 right?

9 A. Yes, sir.

10 Q. All right. On February 17th, 2002 were you

11 working?

12 A. Yes, I was.

13 Q. Did you have your dog with you?

14 A. Yes, he was.

15 Q. Were you assigned to get involved in the

16 investigation involving a stolen car?

17 A. Yes, sir.

18 Q. About when was it that you became involved in

19 that?

A. It would have been approximately 9:30 to 10:00 o'clock in the morning.

Q. What were you told to do?

A. I was told to go to the Roscoe interchange.

Q. And were you told why you were to go there?

A. I was, yes.

Q. And what did they tell you?

A. There was a stolen vehicle and there was two, two or more individuals that they wanted the dog for.

Q. Okay. And did -- were you told what vehicle it was that had been stolen that these two you were supposed to try to find?

A. No.

Q. Okay. So you went toward the Roscoe interchange, is that right?

A. Yes.

Q. And what happened then?

A. Approximately quarter mile from the Roscoe

interchange we also had an airplane and he advised me that he had located two subjects running in the field.

Q. Had they been apprehended at the time that the pilot said that to you?

A. No.

Q. I take it it was either the pilot or somebody in the plane that was involved, is that right?

A. It's the actual pilot, yes.

Q. Okay. So he at that point was looking at two men that were running in a field?

A. Yes.

Q. All right. What happened then?

A. There was other units as well as myself. And he was directing us how to get to those individuals.

Q. And what did you do?

A. I followed his directions and ended up in a, I believe it was a wheat field. And those two

individuals were already taken into custody when I arrived.

Q. Okay. Who arrested them?

A. There were two troopers there, I believe it was Trooper Whetstine and Trooper Belgum.

Q. Okay. And what did you do then?

A. At that point I kind of did a perimeter security with my dog as those two troopers, I believe, searched the other two individuals.

Q. Okay. What happened then?

A. At that point they found a credit card, as well as a bag of marijuana.

Q. What happened then?

A. At that point those two items were seized and the two individuals were taken to Ogallala corrections.

Q. What did you do?

A. I went to corrections with the two officers, two troopers.

Q. And when you got there what did you do?

A. I took the credit card that was located on one subject and attempted to call American Express to try to identify an owner.

Q. Would, I take it there was a name on that credit card?

A. Yes, there was.

Q. And what name was that?

A. Michael Gerard.

Q. Had you ever heard that name before?

A. Never have.

Q. Did you know where -- well, you talked among yourselves, you officers that were involved in arresting these two fellows?

A. Yes.

Q. And were these two young men?

A. The two troopers?

Q. Well, I'll bet they were too. But the two guys that were arrested were young men?

A. Yes, they were.

Q. Okay. And from talking among yourselves did anybody indicate they had ever heard of Michael Gerard?

A. No, they haven't.

Q. And so what did you do to try to determine who that was?

A. I called American Express.

Q. And what happened while you were doing that?

A. A deputy came into the jail booking area.

Q. A deputy sheriff?

A. Yes.

Q. From what county?

A. Keith County deputy sheriff.

Q. All right. And what happened then?

A. I showed him the credit card while I was on hold to American Express and he said, I know him.

Q. So what did you do?

A. I asked him, how do you know him? He said, I

know him, he lives south of Roscoe.

Q. So did you hang up?

A. Yes, I did.

Q. Okay. So what happened then?

A. We got the Ogallala phone book out and attempted to find an address and a phone number.

Q. Did you find one?

A. Yes, we did.

Q. What did you do then?

A. I don't recall who but we made a phone call to the residence.

Q. Did you personally?

A. I didn't personally, no.

Q. Okay. What happened -- were you in the presence of the person who made this phone call?

A. Yes, sir.

Q. And what happened?

A. There was no answer.

Q. Whoever it was that made the phone call told

you there was no answer?

A. Yes. I believe it was Trooper Whetstine made the phone call.

Q. Okay.

A. There was no answer.

Q. So what did you do then?

A. The deputy knew the location of the residence. He was also involved in the happenings earlier that night with the pursuit of the stolen vehicle.

Q. Okay. Now, are there two stolen vehicles involved in this story?

A. Yes, there is.

Q. All right. And were you aware that there were two stolen vehicles at the time that this phone call was being made to --

A. I believe I did. I had some understanding on what occurred earlier.

Q. Okay. And what was understanding at that

point as to what had occurred so far?

A. What I understood occurred so far, that earlier that evening, approximately midnight or later, there was a pursuit involving, I believe it was a Firebird but I don't know what color, in that general proximity of south of Roscoe.

Q. On the interstate?

A. It was on the interstate as well as on the county roads.

Q. Okay. And what else did you understand about the stolen cars?

A. When I got called there was a pickup truck being stolen at that moment. The female was on the phone while her vehicle was getting taken out of her garage.

Q. And did you get a description of that vehicle?

A. Yes.

Q. Was that vehicle actually driven away?

A. Only a few hundred yards. Just barely out of

the driveway.

Q. Okay. Later investigation uncovered that pickup?

A. Yes, we did.

Q. Okay. And it was that vehicle being driven away from a farmstead in this general vicinity that caused you to be called to the Roscoe interchange?

A. Yes.

Q. All right. So after you talked to this deputy Keith County sheriff, this Keith County deputy sheriff, who knew Michael Gerard or knew of him any way, what, and this phone call was made, what happened then?

A. At that point we determined that we should go to that residence and check welfare.

Q. Of?

A. Mr. Gerard.

Q. Okay. And why did you feel that that was appropriate?

A. All the pieces were kind of fitting in. That is where our pursuit ended. One of the gentlemen had his credit card on his person. Just a natural course of events led us out there.

Q. Okay. And you say that you thought it would be appropriate to check on his welfare. Why? What were you -- what did you suspect?

A. At that point we didn't know. Did we have a robbery? Did we have a homicide? We didn't know. We needed to pursue what may have occurred out there.

Q. Neither of these men that were apprehended were Mr. Gerard, I take it?

A. No, they weren't.

Q. Did you suspect that this was a stolen credit card?

A. Yes, sir.

Q. So what did you do after you decided it would be appropriate to check on Mr. Gerard's welfare?

A. At that point the Keith County deputy, Deputy Arndt, myself and another trooper proceeded to Roscoe.

Q. All right. How far is that from where you were?

A. About six miles, approximately, to Roscoe and another mile and a half south. So about seven and a half miles, roughly.

Q. Okay. Did you go in the same vehicle, did you go in separate vehicle?

A. We took three units.

Q. All right. And you went to the farmstead of Michael Gerard?

A. Yes, sir.

Q. When you got there did you all, all three units arrive at about the same time?

A. Yes.

Q. And when you got there what did you see?

A. I saw a house, attached garage, a barn,

typical farmstead.

MR. GILLAN: Your Honor, could I approach the witness with an exhibit, defense Exhibit 101?

THE COURT: Yes.

Q. (By Mr. Gillan) Showing you Defendant's Exhibit No. 101, does that appear to be an aerial photo of the property you're talking about?

A. Yes, it is.

Q. Now, on this exhibit is, do you see a, what appears to be a gravel or dirt driveway?

A. Yes, there is.

Q. And does -- is that leading from the left edge of the photograph as you look at it?

A. Yes, it is.

Q. Okay. And I take it that all three units drove in on that driveway into the farmstead?

A. Yes, we did.

Q. Where did they -- I take it you all stopped

and got out?

A. Yes.

Q. Where did you stop?

A. It would be to the east of this detached garage.

Q. Okay. East being to the right?

A. The right. It's, yes, kind of right.

Q. Okay. And so that would be basically right in the middle of this photograph?

A. Yes, it is.

Q. Okay. Eventually did you do a, did you climb a ladder leaning against this garage?

A. At some point, yes.

Q. Okay. And the garage, there was a large barn just to the left in the lower part of the photograph, is that right?

A. Yes, there is.

Q. And just above the peak of that in this photograph is there a two stall garage?

A. Yes, there is.

Q. Is that the garage that you've been talking about?

A. Yes, it is.

Q. Okay. So the three of you had gone into the middle of this farmstead, you stopped, you got out of your vehicles and what happened then?

A. At that point Trooper Moeller and the deputy approached the house. Referring back to this picture, I went between the house and the barn, correction, the garage and the barn to try to start clearing the area.

Q. Clearing the area meaning what?

A. We thought from other information from Minnesota we thought there was another subject that still could be there.

Q. Okay. What made you think that?

A. At some point Trooper Whetstine got ahold of where this first vehicle was stolen.

Q. In Minnesota?

A. In Minnesota. Those people said that there were three kids that were in that vehicle. We were only able to find two in Nebraska.

Q. Okay. Did you have names?

A. At that point we didn't, no.

Q. At least you weren't aware?

A. I believe Trooper Whetstine may have, but I wasn't, no.

Q. Okay. And did officers have the names of the men that were arrested?

A. Yes.

Q. Was one of those the names -- was the name of one of those men the same as the name given by Minnesota or do you know?

A. I don't know.

Q. Okay. Based upon what you were told by these other, by various officers involved in this, you believed there may have been a third person

involved?

A. Yes.

Q. All right. Did you see anybody on the farmstead?

A. No.

Q. Did you see any vehicles?

A. Yes.

Q. What kind of vehicle?

A. There was a pickup truck, I don't remember the make, I believe a Ford pickup truck, as well as a motorcycle.

Q. Where were they?

A. The pickup truck, referring back to the photo, was to the right of the barn, kind of parked in the driveway. And the motorcycle was inside the two car garage.

Q. All right. And did either of those vehicles seem to have anything to do with either of the stolen vehicles or this credit card?

A. No.

Q. Okay. Did, did you, you three law enforcement officers driving three vehicles cause enough noise, doors opening, closing, driving in the driveway, to attract the attention of the dogs?

A. Yes, there were two dogs.

Q. Okay. And where were the dogs?

A. The dogs were located in a fence surrounding the house.

Q. Okay. Did they bark?

A. Yes, they barked.

Q. So they caused a lot of noise too I take it?

A. Yes, they did.

Q. And that noise didn't cause anybody to come out of any out building or house?

A. No.

Q. What kind of dogs?

A. Rottweilers.

Q. Two rottweilers?

A. Yes.

Q. Are they large dogs?

A. Very large dogs, yes.

Q. Larger than your dog?

A. Yes, he is.

Q. So were you able to hear anything when you were on the driveway there?

A. There was music coming from the two car garage.

Q. Did you eventually approach that garage?

A. Yes, I did.

Q. Was it locked?

A. Yes.

Q. Did you try to get into it?

A. Yes.

Q. Okay. And did you try to lift the garage doors?

A. I believe at some point I did, yes.

Q. Were they locked?

A. Yes.

Q. Was there another door?

A. Yes.

Q. Was it locked?

A. Yes, it was.

Q. Was it padlocked?

A. I don't, I don't believe so. It would have been a handle lock.

Q. But in any event, you couldn't get in?

A. Now that I'm thinking back, the two garage doors did have a big padlock on them. But the main door, it must have been a key lock.

Q. Okay. And those, those doors were locks you couldn't get in?

A. Yes.

Q. Were there windows in that two stall garage?

A. Yes, there was.

Q. Could you see into the garage?

A. Yes, I could.

Q. Were there any lights on in it?

A. Yes, there was.

Q. Could you tell where the music was coming from?

A. You could, yes. Somewhere in that lower part. There must have been a radio. You couldn't see it visually, though.

Q. Could you tell it was a radio?

A. Yes, cause the music would quit playing and, yes, a DJ would come on.

Q. Okay. Did you try to pound on the door or yell for anybody inside?

A. Yes, I did.

Q. Did anybody respond?

A. No.

Q. You could see through the windows into the lower part of the garage, is that right?

A. Yes.

Q. In looking at the garage did you suspect that

there was an upper floor?

A. Yes.

Q. And what was the basis of that suspicion?

A. You could clearly see that there was a floor as well as a pull down staircase.

Q. Okay. You could see that there was ceiling in the first floor of the garage?

A. Yes.

Q. And was the garage tall enough for there to be a room above the main floor of the garage?

A. Yes, sir.

Q. What, did you try to in some way to see into the building other than through the window?

A. Yes, I did.

Q. And how was that?

A. There was an extension ladder sitting on the left side, I don't believe it was leaning against it, it was laying on the ground. And there was a vent that I could see. So I put the ladder up

against the garage.

Q. Okay. And why did you do that?

A. So I could see up in that second story.

Q. And why did you want to look into the second story?

A. To see if Mr. Gerard was there or to see if there was another missing suspect there.

Q. Okay. So I take it you put the ladder up and climbed the ladder?

A. Yes, I did.

Q. And when you got to the vent what happened?

A. I got fairly close to the vent to try to see up through it. It's a, it's a vent, a typical vent. You can't see straight in it so I had to try to look up in through it.

Q. Are there louvres on this vent so the rain doesn't get inside?

A. Yes, sir.

Q. And when you got up there and you looked

through the vent at all what could you see?

A. I couldn't see anything through the vent.

Q. Okay. How close to this vent were you?

A. Less than an inch. I had my face right up against it.

Q. Okay. And what did you notice then?

A. An overwhelming odor of raw marijuana.

Q. You recognized that from your training and experience?

A. Yes.

Q. You couldn't see any marijuana?

A. No.

Q. You couldn't see anything?

A. No, sir, I couldn't see.

Q. At that point what did you suspect?

A. At that point I didn't know. There's a lot of things that we were -- we were there and I was thinking to process everything that's going on. So I climbed down the ladder.

Q. Okay. And what did you suspect was inside that building?

A. I knew there was marijuana inside the building.

Q. Based on the odor?

A. Yes.

Q. So what did you do then?

A. At that point I got the other two guys back from the house. And I called my supervisor.

Q. And did you tell him what you had found at this Gerard residence?

A. Yes.

Q. And what happened then?

A. At that point my supervisor contacted the drug division, Sergeants McKain, and it was turned over to them.

Q. Okay. As it turns out Mr. Gerard was not anywhere around, is that right?

A. Later that night we discovered that, yes.

Q. Okay. Did you know that when you put the ladder up against the wall of the garage?

A. No.

Q. And actually no one was found in any of the out buildings or the residence after it was searched, isn't that right?

A. No, there wasn't.

Q. Did you know that when you put the ladder up against the garage?

A. No, sir.

Q. You are a dog handler and your dog is trained to identify drugs. Were you sent to this place, to this Gerard residence -- well, first, were you sent to the Roscoe interchange because your dog can identify drugs?

A. No.

Q. Were you, did you go to the Gerard residence in order to use your drug dog?

A. No.

Q. Did you use your drug dog?

A. No.

Q. You were involved in serving a search warrant?

A. Yes. I did security.

Q. Okay. You didn't use your drug dog even then?

A. No.

Q. So the fact that you were the one that put the ladder up against the wall and climbed up to the vent has nothing at all to do with a drug investigation?

A. Absolute coincidence.

Q. Okay. Did you believe that your actions in taking this ladder and putting it up against the building in order to climb up and look in the vent were justified by the circumstances?

A. Yes, sir.

Q. And at the time you did that you were looking for what persons?

A. Actually two people. I was trying to find the

residents of that farmstead as well as one remaining suspect.

Q. And that residence -- the resident, you believed, was Michael Gerard?

A. Yes, sir.

Q. And the other man that you were looking for was involved in what, you believed?

A. A stolen vehicle in Minnesota.

Q. That was involved in a high speed chase during the night time hours between the 16th and the 17th?

A. Yes. Actually twice. They were also in pursuit with Minnesota earlier that day.

MR. GILLAN: Okay. I don't believe I have any other questions, Your Honor.

THE COURT: Cross-examination?

MR. BRENNAN: Thank you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q. You weren't involved in anything that happened

on the night of February 16th?

A. No, sir.

Q. So your knowledge is just what other officers may have told you and what you did directly on the morning and afternoon and evening of February 17th?

A. Yes, sir.

Q. And on that day you were, you arrived at the location just south of I-80 where the two suspects were apprehended by other troopers?

A. Yes.

Q. And did you participate in their arrest at that location?

A. I was there, yes. I didn't put the handcuffs on them, no. That was the other two troopers. I was there again for security with my dog.

Q. But when they were removed from the scene of the arrest and taken to Ogallala to the, did you say corrections?

A. Yes.

Q. That's where the Keith County sheriff's office is?

A. Yes, sir.

Q. You went with them?

A. Yes.

Q. Or followed them in your vehicle?

A. I followed them, yes.

Q. And participated in helping with the investigation at that location?

A. Yes.

Q. The men that were arrested made no statements regarding the credit card?

A. Not when I was there, no.

Q. And as far as you are aware they made no statements regarding Mr. Gerard?

A. No.

Q. And made no statements regarding where the stolen Minnesota vehicle was?

A. At that point, no.

Q. And made no statements that would indicate that there was some third person with them?

A. To me directly, no. There was some to Trooper Whetstine that there should have been a third person.

Q. That was what you said was told to Mr., to Trooper Whetstine from people in Minnesota?

A. Yes.

Q. I'm talking about what the two arrested men said. And they didn't say anything about a third person?

A. In my presence, no.

Q. And you didn't talk to anyone from Minnesota?

A. No.

Q. But you knew that Trooper Whetstine had some information from Minnesota?

A. Yes.

Q. And that information was that one of the two men that was arrested was a suspect in a stolen

vehicle and a pursuit in Minnesota along with someone else?

A. Yes.

Q. They didn't say there were three people involved in that pursuit, they said there were two people but the names weren't the same two names as the two men that were arrested?

A. It was my understanding that there was three kids in that first pursuit. That was third-hand information. And that's the way I understood it.

Q. Okay. And again, you are not getting this information from any direct source?

A. No. That's all coming from the lead officer, Trooper Whetstine. I'm just there to assist.

Q. And he got a teletype from Rochester, Minnesota?

A. I don't know.

Q. You never looked at that?

A. No.

Q. So you don't really know what Rochester, Minnesota said to Trooper Whetstine?

A. No, I don't.

Q. When the decision was made to try to contact Mr. Gerard, you, Trooper Moeller and Deputy Arndt went to the farm?

A. Yes, sir.

Q. In three separate police vehicles?

A. Yes, sir.

Q. And at that time you didn't know for sure what happened so you went out there just to check on Mr. Gerard's welfare?

A. Yes, sir.

Q. And while you were there you went to the location where the garage is that you've identified on the Exhibit 101?

A. Yes.

Q. The other two officers were over near the residence where the dogs were?

A. Yes.

Q. And you could see that the garage had two windows on the overhead doors or that there were windows on each of the overhead doors?

A. It looks like there's three.

Q. Three separate windows on each overhead door?

A. Right. If I remember right there might have been cardboard on a couple of those. Maybe plastic, I don't know if it was cardboard.

Q. You could see through those windows?

A. Yes.

Q. Into the inside of the garage?

A. Yes.

Q. And you couldn't see any individuals?

A. You could just see clutter. Tons of stuff.

Q. And there was no vehicle in there?

A. There's a motorcycle.

Q. No stolen vehicle that you were looking for?

A. Not that I could see, no.

MR. BRENNAN: May I have some exhibits marked, please?

THE COURT: Yes.

MR. BRENNAN: May I approach the witness?

THE COURT: Yes.

Q. (By Mr. Brennan) Trooper Crymble, I'm showing you what's been marked for identification as Exhibit 102, is that right?

A. Yes, sir.

Q. Does that appear to be a photograph of the garage that's depicted in Exhibit 101?

A. Yes, it is.

Q. And is that how it looked to you when you were there on February 17th, 2002?

A. Yes.

Q. So you can see the two overhead doors and the windows in them?

A. Yes.

Q. That would be the, where those overhead doors would be, that would be the south wall of the garage?

A. Yes.

Q. So that as it's depicted in Exhibit 101 the south wall of the garage is kind of at an angle pointed to the bottom right?

A. That's correct, yes.

Q. So that the aerial photograph is a little south and west of the farm grounds?

A. Yes. True north is, is over there, so you're correct, yes.

Q. I'm showing you what's been identified as Exhibit 103, is that correct?

A. Yes.

Q. Does that appear to be the west wall of the garage?

A. Yes, it is.

Q. Is that how it appeared to you when you were

there on February 17th, 2002?

A. Yes.

Q. I'm showing you what's been marked for identification as Exhibit 104, is that correct?

A. Yes.

Q. Does that appear to be the upper portion of the west wall of the garage?

A. It is, yes.

Q. Is that, at the top of the photograph depict the vent that you climbed the ladder to peer through?

A. Yes, it is.

Q. And I'm showing you what has been marked as Exhibit 105, is that right?

A. Yes.

Q. And does that appear to be the, the door on the west wall to the garage?

A. It is, yes.

Q. And does that, is that how it appeared to you

when you were there on February 17th, 2002?

A. I would say it is. I don't recall the padlock. I thought those were on the garage doors. But it's the -- it's accurate.

Q. The Exhibit 102 shows the overhead doors?

A. Yes.

Q. It doesn't appear there's anywhere to put a padlock on?

A. Yes, there is, right there. Right in that corner is a padlock.

Q. Okay. So the overhead doors were padlocked and the side door was padlocked?

A. I don't recall one on the side door but I do remember these corners were padlocked.

Q. On the overhead doors on both of them?

A. I don't know both of them. I -- you can clearly see there's a padlock on that one.

Q. Okay. You don't remember there being a padlock on that door on the west wall?

A. I don't.

Q. Is it possible that there was?

A. Oh, sure, yes.

Q. You weren't able to open it?

A. No.

Q. You tried to open it?

A. At some point, yes, I'm sure I tried to crack it.

Q. Before you climbed the ladder?

A. Yes.

Q. Did you participate in the search of the upper portion of the garage?

A. Yes, I did.

Q. So you climbed the stairs and went up into the upper level?

A. Yes.

Q. So you saw what it looked like inside there?

A. Yes.

Q. Both, were there two rooms up there, two

different grow rooms?

A. Yes.

Q. One on the west half of the upper portion and one on the east half of the upper portion?

A. Yes. It's almost half exactly.

Q. So you were able to see the inside wall above the west half of the garage where the vent was?

A. Yes.

Q. I'm showing you what's been marked as Exhibit 106, is that right?

A. Yes, sir.

Q. And does that appear to be the inside of the west wall?

A. Is it this way?

Q. Yes, that way.

A. Yes. I think the vent would be right where you try to put the insulation.

Q. Or maybe right here where this looks like it's sealed off, doesn't it?

A. Yeah. That would be, I would guess somewhere right in there.

Q. Okay. So where there appears to be red and kind of clear fabric in a rectangle that would be on the inside of the wall where the vent is?

A. Yes, sir.

MR. BRENNAN: Okay. I would offer Exhibits 102 through 106.

THE COURT: Any objection?

MR. GILLAN: Yes. To 106. The others I don't object to.

THE COURT: What's the basis of 106?

MR. GILLAN: The answer to the question was it could be. This is a photograph apparently of the inside. These are, I think the other, the others are easily identifiable as those particular buildings or that particular building and parts of it. But 106, we don't know when it was taken, the trooper just says it could be.

THE COURT: So I take it that's a foundational objection?

MR. GILLAN: I didn't think that -- succinctly, yes.

THE COURT: Are you requesting permission to voir dire the witness?

MR. GILLAN: Sure.

THE COURT: Go ahead.

FOUNDATIONAL EXAMINATION BY MR. GILLAN:

Q. Trooper, you didn't take photograph Defense Exhibit 106, did you?

A. No, sir.

Q. Do you, did you see anything that looks like that in this garage?

A. When I went upstairs, yes.

Q. Okay. And can you tell whether that is a photograph of a part of the inside of that garage?

A. It looked like it could. It definitely could. Is it the one? I don't know. More my

problem is I don't think the vent was here, I think it's up where this insulation was stuffed, is my issue with the picture.

Q. Okay. So did you inspect the vent in the, in that garage?

A. No.

Q. When you were in it?

A. No.

Q. When you were inside it? When you were inside the garage?

A. If this is the room, yes, you can look over here and just as we were searching, yes, I looked to try to figure out where that vent is coming, you know, through, through the wall.

Q. What did you notice?

A. This is somewhat of an accurate picture. But I do believe it's in this triangle up here where that vent is. It's hard to tell with the picture.

Q. So does this photograph look the same as what

you saw inside the garage?

A. It is somewhat accurate, yes.

Q. Okay. When you say somewhat, I take it that it's somewhat inaccurate?

A. Because it's not a three dimensional picture. It's tough to say in two dimensions. It's kind of it's more taken of the corner.

Q. So you don't know what that is a photograph of, is that correct?

A. That is correct.

MR. GILLAN: Okay. I don't have any other questions.

THE COURT: All right. Mr. Brennan, additional questions?

MR. GILLAN: And I have another objection, Your Honor, and that's relevance.

THE COURT: You may proceed.

Q. (By Mr. Brennan) Does this appear to be what you observed from the inside of the upper portion

on the west wall where the vent was?

A. Yes, sir. Not trying to be difficult, it's more the dimension of the picture. Yes. It very well could be in there.

MR. BRENNAN: I renew my offer of the exhibit.

MR. GILLAN: I renew my, both of my objections.

THE COURT: The objections are overruled. The exhibit is received. I should say all of the exhibits are received.

Q. (By Mr. Brennan) Now, when you got the ladder your purpose in using the ladder was to look through the vent?

A. Yes, sir.

Q. And when you tried to open the doors to the garage your purpose was to look into the garage?

A. To clear the, yes, for individuals.

Q. Did you note whether there was a mail box to

the residence out on the road?

A. I don't recall if there's one.

MR. BRENNAN: May I have just a moment, please?

THE COURT: Yes.

MR. BRENNAN: Those are all the questions I have.

THE COURT: All right. Mr. Gillan?

MR. GILLAN: I don't have any other questions.

THE COURT: All right. I believe you testified that when you and the other officers decided to go out to the defendant's residence one of the factors that you considered was that the stolen pickup was from an area you said, quote, near the defendant's farm. How near was it?

A. The stolen pickup was probably taken at the next section road. Which was approximately three-quarters of a mile.

THE COURT: You also testified that the defendant's farm was where the pursuit had ended. What were you referring to?

A. Earlier that evening the --

THE COURT: Which evening?

A. It would be Saturday night, I believe. This was the 16th, 17th, so the night of the 16th, Trooper Whetstine was in a pursuit with, I believe, a black Firebird. They went back and forth between Roscoe and Ogallala on the interstate. The vehicle went south of Roscoe on county roads and Trooper Whetstine lost that vehicle.

And this, this whole, this residence where that first vehicle was lost, where the second vehicle was stolen, is in a section. It's all in close proximity.

THE COURT: All within one mile section?

A. Yes, it is.

THE COURT: One square mile?

A. Yes.

THE COURT: That's all I have.

Questions on my questions? Mr. Gillan?

MR. GILLAN: No, Your Honor.

THE COURT: Mr. Brennan?

MR. BRENNAN: Just briefly, Your Honor.

RECROSS-EXAMINATION

BY MR. BRENNAN:

Q. The pickup that was reported stolen was reported by a woman you named Nettie Mae Nelson?

A. I don't know.

Q. You don't know where she lives?

A. I know where the pickup was stolen, yes. If Nettie lives there I don't know.

Q. Okay. It was stolen from a farm that was three miles -- that was one mile west and one and a quarter mile south of the Gerard farm, isn't that

right? Excuse me, north, one and a quarter mile north of the Gerard farm?

A. One and a quarter, see, I'm just going off of section roads. It would be that one road down, then you take pavement back probably a quarter. So, yes, it's within that, I mean, it's still within that section, though.

Q. One mile west?

A. From Mr. Gerard's you go probably less than, probably three-quarters of a mile.

Q. To the west?

A. No, to the north. You have to cut back on pavement on that section road. And if it's Nettie's, she lives on that corner. So it's probably a mile and a quarter.

Q. Okay.

A. The true section is a mile, so, yes.

Q. And the vehicle that Trooper Whetstine pursued, did you say it was a black Firebird?

A. I don't know. I believe it was a Firebird. Color -- I know it was a sports car. I had no part in that.

Q. Okay. His report said it was a blue Camaro, would that be?

A. It may be. I had no, no part of that.

MR. BRENNAN: Okay. That's all.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

THE COURT: Mr. Gillan, how many more witnesses do you have?

MR. GILLAN: None.

THE COURT: Oh. I take it that's a rest?

MR. GILLAN: Yes.

THE COURT: All right. Mr. Brennan?

MR. BRENNAN: I will rely on the evidence presented by the government and the

cross-examination of those witnesses.

THE COURT: All right. Very well. I'll hear your arguments. Mr. Brennan.

MR. BRENNAN: It's clear that Mr. Gerard manifested an expectation of privacy in the contents of the garage. It was padlocked. The overhead doors were padlocked. The side door was padlocked.

So -- and it's clear from the testimony of Trooper Crymble that he was attempting to look into the garage by attempting to open the doors, and by attempting to look through the vent. That constitutes a search and he didn't have a warrant at the time that he did that.

The Second Circuit has held that the use of a dog to sniff for narcotics outside an apartment constituted a search that in the absence of a warrant violated the Fourth Amendment. So if that's true then clearly climbing a ladder to look

in, and smelling inadvertently while you're attempting to look in, constitutes a search, that in the absence of a warrant would violate the Fourth Amendment. Unless there is an exception to the warrant requirement. The case that the, that I'm talking about is United States versus Thomas. That's a case reported at 757 F. 2nd, page 1359.

I don't think there's any question, there's a lot of cases that say that you can run a dog around an automobile on a public highway, that's not a search that involves the Fourth Amendment. But we're not talking about an automobile here, we're talking about a farm, a farm house and the buildings that are within the curtilage of the farm. Buildings where there is an obvious intent to manifest privacy, a privacy interest that was violated when Trooper Crymble attempted to search inside the garage prior to obtaining the warrant.

The claim that it was necessary to do that in

order to protect Mr. Gerard or check on his welfare just doesn't add up. The claim is, hey, we thought there was a third guy. Because when we got the two names of the people that stole the vehicle in Minnesota they weren't the same two names of the two guys that we captured in Nebraska. One of them had the same name, one of them had a different name. Well, that doesn't prove that there's a third person. In fact, on the night of February 16th Trooper Whetstine --

(End side 1 of tape 109.)

-- the report of an attempt to steal a pickup. There was never a suggestion that there were three people involved in that.

When a farmer said somebody asked him for a ride then he turned them down, he said it was two people. He gave a description similar to the one given by Nettie Mae Nelson or the lady who called in they theft of her pickup. There was never any

evidence that a third person was involved except through a claim now that there has to be some reason for looking into the garage so we've got to come up with a third person.

What's the easiest way to say that there was grounds to look for a third person? Well, the easiest way is to say, well, let's see, we had two names reported by the state of Minnesota, one of those names was one of the two guys that we captured in Nebraska, but because the other guy had a different name that means that now there must be some third subject. And that's just speculation. That can't constitute a reasonable basis to conclude that there were exigent circumstances making it necessary to check on his welfare by conducting a search absent a warrant.

I will anticipate that the government will argue that, well, if that's the case and there weren't exigent circumstance sufficient to justify

the necessity to check on his welfare and therefore it was not appropriate to conduct a search absent getting the warrant first, that it's okay because we would have got the warrant anyway, through some claim of inevitable discovery.

But in order to rely on inevitable discovery they have to prove that the evidence would have been discovered by lawful means but they already discovered it by unlawful means. I'm not claiming that the fact that two guys were arrested who were involved in a pursuit the night before and a stolen vehicle and who tried to steal another vehicle the following morning, that the fact that they were arrested or what they had on them wasn't obtained lawfully. We have no standing to assert any violation of their constitutional rights and I don't believe there's any evidence to claim that any of that evidence was obtained illegally.

But the mere fact that one of them had a

credit card with Mr. Gerard's name on it doesn't create exigent circumstances and doesn't create probable cause to search Mr. Gerard's residence.

We respectfully submit that that was an illegal search and that the fruit of that illegal search was the warrant and the subsequent evidence seized pursuant to the warrant. And as such the Fourth Amendment requires that the evidence be suppressed pursuant to the exclusionary rule and that there are no valid exceptions to the warrant requirement or the exclusionary rule that apply in this case and we respectfully request that the Court sustain the motion and suppress that evidence at trial.

THE COURT: Mr. Gillan?

MR. GILLAN: Your Honor, this was, this was excellent police work. The troopers and the deputy sheriffs did exactly the right thing in trying to figure out how it was that Mr. Gerard's

credit card came into the possession of these two guys who apparently were involved in both of these stolen vehicles and chases.

You have to put yourself in the position of these troopers who have what appears to be a stolen credit card, two guys that steal cars and get into high speed chases, who are out running loose. What are the troopers supposed to do?

They've got go try to find Mr. Gerard. They tried calling him and didn't get in touch with him. They weren't to his farmstead and there's a radio on in this garage. They can't see into the out buildings where a car could be. They don't know whether the Minnesota stolen car was somewhere on the farmstead. They don't know whether Mr. Gerard has been killed, being held captive, he's tied up.

They don't know whether the two men who were arrested are the same two from the night before.

They, they think so. Especially considering that one of them has the, is the name that was named by Minnesota as being involved in the stolen vehicle. But they have got a real mystery on their hands and justifiable concerns for the welfare of Mr. Gerard and the whereabouts of this other named man, Southard, who was reportedly involved in the Minnesota stolen car.

You know, it's certainly possible that these men knew Mr. Gerard and he loaned him the credit card or they found the credit card. But it's also plausible that they had robbed Mr. Gerard and were holding him or had killed him or something. This was perfectly justified by exigent circumstances if it's a search, and I don't think it's a search.

They didn't ever cross the threshold until they had a warrant. They merely used a ladder that was nearby, put it up against a wall and climbed up. That's not a search. And it's certainly not a

search of the inside to smell the smell of marijuana.

There is no claim that this is all after the fact justification for their doing that which they wanted to do anyway, which was to go in and search Mr. Gerard's residence for marijuana. But, I mean, for crying out loud, here is an officer who has a drug dog. They weren't out there on a drug investigation. They were out there on a stolen credit card investigation of a possible burglary, robbery, hostage taking, murder. Who knows?

They did just the right thing. I think that Crymble went above and beyond in trying to figure out whether there was anybody in there with the, with the radio playing. I think he did an excellent job and was certainly justified and for any number of reasons that I've already talked about you ought to overrule the motion.

THE COURT: Mr. Brennan?

MR. BRENNAN: Mr. Gillan said a number of times that they didn't know. They didn't know. The officers said they didn't know. So what they were doing was speculating based on hunches. And to claim exigent circumstances you have to base that claim on clearly articulated facts, not speculation and not hunches. And that's all it was.

And it may have been good police work to go out there and see if Mr. Gerard knew that these guys had a credit card with his name on it. But they didn't stop there. They went farther than that. And they conducted a search. To say that it's not a search when you're trying to open the doors to get inside and you're climbing a ladder to look inside ignores the obvious. It clearly was a search.

And if using a dog to sniff outside of an apartment constitutes a search under the Fourth

Amendment, clearly trying to look inside and smelling an odor while you're doing that constitutes a search under the Fourth Amendment. So it's our position that it clearly was a search.

There's no question there was not a warrant. Thus the warrant -- thus that search was illegal, unless there's an exception to the warrant requirement. And exigent circumstances can't be based on mere speculation or a hunch.

THE COURT: Well, first of all, let me say I find the facts to be essentially as were recited by Mr. Brennan in his opening statement, and as agreed to by the government. The evidence adduced during the hearing itself amplifies those facts but is essentially in accordance with them.

I do think that the climb -- the obtaining and use of a ladder to look into a locked garage that is otherwise indicating all indication, or all indicia of the owner wanting it to be held private

is a search. I think that none of us would think that we did not have a legitimate expectation of privacy in out buildings, particularly a garage, when we lock them and make them otherwise generally inaccessible.

It's clear that an officer has the right to observe whatever is in plain view when he or she is on property of another for some legitimate purpose. I think it's clear that the officers were on the property for a legitimate purpose, that is, to look for a stolen vehicle, Mr. Gerard or the possibility of another suspect. I don't, I don't consider their entry on to the premises as being violative of anything.

But once there was the taking of the ladder and climbing up the ladder, I think that's definitely a search. There was no probable cause for that search. There was no warrant. And the next question is whether or not there were exigent

circumstances. But I'll get to that in a moment.

I should also say that I am confident that if that section of the affidavit in support of the search warrant were deleted that the issuing judge would not have granted the application for a warrant. The mention of Mr. Gerard in the affidavit is almost in passing.

It does say that his credit card was found on one of the suspects from the Minnesota car theft. That's essentially all it says. The stolen pickup is not pinpointed as being close to his farm. The area where the suspects were arrested is not pinpointed as being close to his farm. The only thing that connects him to any of this in the affidavit is the credit card.

Now, Trooper Crymble testified that he and the other officers discussed other reasons why they might go to the farm. Those being that he said the pickup was stolen from property near the

defendant's farm. That wasn't in the affidavit. But that might have been one of the reasons that they wanted to investigate. And he gave it as one.

He also said that the pilot who had been in the aircraft told him that he saw two men running in a field. Again, that field is not pinpointed as being near the defendant's farm. But in light of the other facts it may have justified their at least having some suspicion and reason to investigate further.

It was also reported to Sergeant McKain that the troopers making the phone call had said to him that there was the sound of someone answering the phone and not speaking and hanging up. Again, that's not in the affidavit. But it might contribute to a reason justifying further investigation.

Obviously, the fact that the defendant's

credit card was found on a criminal suspect and obviously without the defendant is a factor justifying their wanting to investigate further.

The fact that the defendant's place was, as Trooper Crymble testified, where the pursuit ended the night before is a rather general statement. He tried to clarify that. That might justify further investigation. The fact that the officers believed a third suspect might be involved again was not in the affidavit but might suggest further investigation.

The fact that no one came out of any building when the dogs were barking alerting that someone strange was there, and specifically not the defendant, that is that no one came out, and specifically the defendant didn't come out, would also be a ground for additional investigation.

There was no report of any trooper hearing any gun fire, any screaming, seeing any flames, having

any idea that evidence was going to be destroyed, that are the typical makings of exigent circumstances.

There was no view of anybody, that is any person or any vehicle other than the motorcycle from peering into the window, into the bottom or the first floor of the garage. There again that might justify some further investigation. But it takes more than that, I believe, to constitute exigent circumstances.

The officers most certainly had reason for further investigation. They had some facts that weren't adding up. And they were suspicious that the defendant was in danger or perhaps had been harmed. I see grounds for further investigation. I don't see grounds for breaking into his property in the absence of probable cause in order to get that.

I think that the action of peering in is a

search. The warrant would not have been issued without that action for any search of any of the defendant's property or premises. And I conclude that the, that the search was not justified by exigent circumstances existing at the time that Trooper Crymble took and assemble -- excuse me -- or ascended the ladder.

So it's my recommendation that the motion to suppress be granted in all respects. I will have the transcript of this hearing transcribed as quickly as possible.

I will have the clerk notify each of you when it has been filed so that you can examine it. You will have 10 days after that filing in which to file objections to the report and recommendation. And at that time it will go before the trial judge.

Is there anything further that we should address today? For the government?

MR. GILLAN: No, sir.

THE COURT: For the defense?

MR. BRENNAN: No, Your Honor.

THE COURT: We'll be in recess.

(11:58 a.m., recessed.)

I, Gary G. Latimer, Court Reporter, certify that the foregoing is a correct transcript from a copy of the tape recording of proceedings in the above-entitled matter to the best of my ability to prepare same.

s/_____
Gary Latimer
Court Reporter
July 23, 2002

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

2002 JUL 18 PM 4:16

GARY D. McFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	REPORT,
	)	RECOMMENDATION
MICHAEL K. GERARD,	)	AND
	)	ORDER
Defendant.	)	

At the conclusion of the hearing this date on the defendant's motion to suppress evidence, I stated my conclusions on the record and my decision to recommend that the motion to suppress be granted. In accordance with that announcement,

IT HEREBY IS RECOMMENDED to the Honorable Richard G. Kopf, United States District Judge, that the motion to suppress, filing 12 be granted.

FURTHER, IT HEREBY IS ORDERED,

1. The clerk shall cause an expedited transcript of the hearing to be prepared and filed, and upon its filing shall notify counsel by phone that it has been filed.

2. Counsel are given ten days from the filing of the transcript in which to file objections to this recommendation.

The parties are notified that failure to object may be held to be a waiver of the right to appeal the district judge's adoption of the recommendation.

Dated July 18, 2002.

BY THE COURT

s/_____
David L. Piester
United States Magistrate Judge

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

02 SEP 19 AM 11:39

GARY D. McFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:02CR3055
	)	
Plaintiff,	)	**MEMORANDUM**
	)	**AND ORDER**
v.	)	
	)	
MICHAEL K. GERARD,	)	
	)	
Defendant.	)	

The magistrate judge has filed a recommendation (filing 21) that the defendant's motion to suppress (filing 12) be granted, for the reasons stated on the record at the conclusion of the evidentiary hearing on the defendant's motion (filing 22, transcript, at 113-18). Pursuant to 28 U.S.C. § 636(b)(1) and NELR 72.4, the government has filed an objection to the magistrate judge's recommendation (filing 26), contending that "the search warrant involved was not the fruit of an illegal search and the motion should be denied." Upon de novo review, I find that the government's objection is well-taken, and that the recommendation should not be adopted. Accordingly, the defendant's motion to suppress will be denied.

I. BACKGROUND

On February 17, 2002, a search warrant was issued by a county judge for the search of the defendant's farmstead in Keith County, Nebraska, including "one white two-story frame house, one white two-story two car garage, one large white wood frame barn, one brown wood frame shack, [and] two additional out buildings." (Filing 14, exhibit 1). The search warrant was obtained by Sergeant R. D. McKain of the Nebraska State Patrol, who stated in his affidavit that there were reasonable grounds to believe that the search would recover "[a] light blue 1995 Chevrolet Camero, ...which was reported stolen on February 16, 2002 from Rochester, Minnesota and was believed to be in the possession of Dustin Delaske and Shane Southard." (Filing 14, exhibit 2.) Sergeant McKain also expressed a belief that Shane Southard and controlled substances might be found on the premises, and he presented the following supporting facts, as provided to him by two Nebraska State Troopers, Whetstine and Crymble:

> At approximately 2253 hours [on February 16, 2002], Trooper Whetstine stopped the light blue 1995 Chevrolet Camero, ...[A]s Trooper Whetstine approached the vehicle it sped from the scene...[A] short pursuit took place and...the light blue Chevrolet Camero...was lost south of the Roscoe interchange...Trooper Whetstine reviewed the video tape from his in-car camera and identified the license plates as being Minnesota passenger car license 494-LTW...
>
> ...Trooper Whetstine contacted Lt. Donneuy of the Rochester Police who advised that on February 16, 2002, a light blue 1995 Chevrolet Camero, bearing Minnesota passenger car license plates 494-LTW was stolen in Rochester, Minnesota. The stolen vehicle was pursued by officers from the Rochester Police Department until it

was lost and the pursuit was then terminated... [T]he Rochester Police Department advised that Shane Southard and Dustin Delaske were in the stolen [vehicle].

[A]t approximately 0850 hours [on February 17, 2002], Nettie Nelson of Keith County called the Keith County Sheriff's Department and advised that her black 2002 Dodge pickup was being stolen...[T]he Keith County Sheriff's Department ad Trooper Whetstine recovered that vehicle less than one half mile from the Nelson residence... [T]wo individuals were apprehended by Trooper Whetstine and Trooper Belgum near Interstate 80. These individuals were identified as Dustin Delaske and Jerid Mertins both of whom are from Minnesota.

...Trooper Crymble, Trooper Moeller and Keith County Sheriff's Deputy Arndt proceed to the residence of Michael K. Gerard south of Roscoe...[U]pon arrival at the residence, Trooper Moeller and Deputy Arndt made an effort to knock on the door of the residence but were prevented from doing so by two large rottweiler dogs which were guarding the residence...[A]ttempts were made to contact Gerard by telephone but no one answered in the residence...Crymble saw a light and heard music playing in the two car garage... [A]n attempt was made to contact someone in the garage area with no success...[T]he garage was paddle locked (sic) shut and Trooper Crymble used a ladder in [an] effort to determine if anyone was in the garage area...[W]hile on the ladder attempting to look through a vent that was near [the] roof of the garage in an attempt to determine if anyone was in the garage, Trooper Crymble smelled the

> strong odor of marijuana coming from the vent...Trooper Crymble...then got off the ladder and backed away from the garage area and contacted his supervisor [with] reference [to] obtaining a search warrant.

(Filing 14, exhibit 2).

After obtaining the warrant, Sergeant McKain and two State Patrol investigators searched the described premises on February 17, 2002, and discovered a marijuana growing operation. The defendant has moved to suppress all evidence that was seized.

II. DISCUSSION

"When a search warrant is not supported by probable cause, any evidence obtained as a result is generally inadmissible, Mapp v. Ohio, 367 U.S. 643, 655-57, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), but there is an exception for evidence obtained by an officer who relied in objective good faith on a search warrant. United States v. Leon, 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). A court may take up the issue of whether the Leon good faith exception applies without first deciding the issue of probable cause, id. at 924-25, 104 S.Ct. 3405; United States v. Frangenberg, 15 F.3d 100, 102 (8th Cir.1994), but the issues are not unrelated. It is objectively unreasonable to rely on a warrant lacking indicia of probable cause or based on an illegitimate affidavit. Leon, 468 U.S. at 923, 104 S.Ct. 3405. Reliance on a warrant is also objectively unreasonable if an officer has reason to know that the warrant was obtained through misrepresentations or omissions, that the issuing magistrate abandoned the judicial role in issuing it, or that the warrant is facially deficient in particularizing the place to be searched or the things to be seized. Id. The totality of the circumstances are considered in determining whether an officer acted in objective good faith under Leon, id. at 922 n. 23, 104 S.Ct. 3405, including consideration of anything the affiant knew but did not include in the affidavit. United States v.

Frangenberg, 15 F.3d 100, 103 (8th Cir.1994)." United States v. Koons, No. 01-3177,___ F.3d ___, 2002 WL 1980478 (8th Cir. Aug. 29, 2002). "Under Leon, evidence obtained under the authority of a facially valid search warrant will not be suppressed if the executing officers acted in objective good faith on the magistrate's determination of probable cause, even if probable cause is later found to be lacking. 468 U.S. at 922, 104 S.Ct. 3405." Id.

I find that the Leon good faith exception is applicable in this case. First, the warrant is not facially defective. Second, Sergeant McKain testified that the county judge appeared to be acting as a neutral and detached magistrate in issuing the warrant, and there is no evidence to the contrary. Third, although there was additional information presented at the hearing that Sergeant McKain could have been included in the affidavit, it has not been shown that the affidavit contained any material misrepresentations or omissions. Finally, the affidavit not "so lacking in indicia of probable cause that no reasonably well trained officer would have relied on the warrant." See United States v. Lindsey, 284 F.3d 874, 878 (8th Cir. 2002).

Moreover, I find that the warrant was supported by probable cause, including "probable cause that there [was] marijuana in the garage area." (Filing 14, exhibit 2.) Although Magistrate Judge Piester has recommended that the defendant's motion to suppress be granted because an unlawful search was conducted when Trooper Crymble climbed the ladder (which had been lying next to the garage) and attempted to look in the vent near the roof of the garage to determine whether anyone was inside, the evidence shows that he did not enter the garage. "An overwhelming odor of raw marijuana" was emanating from the second story of the garage. (Transcript, at 85.) The garage was outside the fenced area of the farmstead, and was separated from the house by a large driveway area. Under these circumstances, I conclude that there was no Fourth Amendment violation. See e.g., United States v. Wright, 991 F.2d 1182, 1186 (4th Cir. 1993) (while defendant had reasonable expectation of his privacy in his barn, officers could

climb outside steps to loft and peer inside through open door). See also United States v. Mooring, 137 F.3d 595, 596 (8th Cir. 1998) (police officers may enter a resident's property to observe buildings located outside the home's curtilage). The officers were simply acting responsibly.

III. CONCLUSION

For the reasons stated, the defendant's motion to suppress will be denied in all respects.

IT IS ORDERED that:

1) the magistrate judge's recommendation (filing 21) is not adopted;

2) the government's objection to the recommendation (filing 26) is sustained;

3) the defendant's motion to suppress (filing 12) is denied; and

4) the clerk of the court shall provide a copy of this memorandum and order to Magistrate Judge Piester.

DATED this 19th day of September, 2002.

BY THE COURT

s/_____
Richard G. Kopf
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-1655

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Nebraska.
Michael K. Gerard,	*	
	*	
Appellant.	*	

Submitted: October 23, 2003

Filed: April 2, 2004

Before RILEY, HEANEY, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Michael K. Gerard argues on appeal that his Fourth Amendment right to be free from unreasonable search and seizure was violated. Gerard's argument is premised on the fact that a police officer, without a warrant, climbed a ladder and attempted to look inside his garage through a ventilation opening. Finding no constitutional error, we affirm the district court.

I. *Background*

On February 17, 2002, Nebraska State Patrolmen entered Gerard's farm property to locate Gerard because events earlier that night raised concern for his safety.[1] Upon arrival at the farmstead, Trooper Jeff Crymble observed a pickup truck parked in a gravel driveway. The driveway separated the farmhouse from a two-story, two-car garage (with a motorcycle visible inside). A fenced yard surrounded the farmhouse. Crymble noticed two Rottweiler dogs within the fenced yard. The fence did not enclose the garage.

Crymble and the other trooper began looking for Gerard or any other persons present on the property. Crymble heard music coming from the garage. He attempted to enter the garage by lifting the overhead doors; however, all the doors were locked. He knocked on the garage door, but on one responded. Crymble testified that he could see through some of the windows in the garage and noticed a radio located on the first floor and that lights were on inside the garage. Using an extension ladder, which he found lying on the ground next to the garage, Crymble ascended the ladder in an attempt to see inside through a vent at the top of the garage. Moments before reaching the vent, Crymble smelled the aroma of raw marijuana coming from the garage.

Immediately, Crymble descended the ladder and notified his supervisor, Richard McKain. Based on Crymble's observation, McKain completed an affidavit and obtained a search warrant

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[1]In the early morning of February 17, 2002, troopers chased a stolen vehicle near Roscoe, Nebraska. The chase ended when troopers lost the vehicle south of Roscoe. Trooper Jeff Crymble of the Nebraska State Patrol was assigned to assist in a stolen-car investigation in the Roscoe area. While assisting in the search, a patrol unit spotted two men running in a field near the Roscoe exit. The two men were apprehended. Crymble conducted an officer-

safety search of the two men. One of the men possessed Gerard's credit card. Gerard was not with them. Crymble took the credit card and attempted to contact the credit-card company in order to locate Gerard. A phone call was placed to Gerard's residence. The officers testified that it sounded as though someone answered the phone at Gerard's residence but then immediately hung up. Upon this event, the officers decided they should go to Gerard's house to find out why the arrested suspects had Gerard's credit card and to follow up on the stolen-vehicle investigation.

for Gerard's farmstead including the two-story, two-car garage. The subsequent search recovered marijuana. Three days later, Gerard was indicted for manufacturing marijuana in violation of 2 U.S.C. §§ 841(a)(1), 846.

On May 6, 2002, Gerard filed a motion to suppress the evidence obtained from the search of his garage on the ground that evidence supporting the search warrant was based on an illegal search. On July 18, 2002, a suppression hearing was held before a magistrate judge. The magistrate concluded that Crymble's obtaining and climbing a ladder to look inside the locked garage constituted a search of Gerard's property. The magistrate also concluded that the officer lacked probable cause to search Gerard's garage, and that no exigent circumstances justified the warrantless search. The magistrate judge recommended that the motion to suppress be granted. The government filed objections to the magistrate judge's report and recommendation.

The district court[2] denied the motion to suppress. In its order, the district court first reasoned that the *Leon* good-faith exception applied.[3] However, the district court also found that the warrant was supported by probable cause. The district court denied Gerard's motion to suppress in an order filed September 10, 2002.

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[2]The Honorable Richard G. Kopf, Chief Judge, United States District Court for the District of Nebraska.

[3]The court found the warrant to be facially valid, that the county judge issuing the warrant was a neutral and detached magistrate, and that the affidavit was not so lacking in probable cause that no reasonable officer would have relied on the warrant. *United States v. Leon*, 468 U.S. 897, 922 (1984) (holding that where an officer relies in objective good-faith on a seemingly valid search warrant the evidence obtained in the search is not excluded).

Subsequently, Gerard pleaded guilty to possession of marijuana with intent to manufacture and distribute, in violation of 21 U.S.C. § 841. At a sentencing hearing held on February 27, 2003, the district court sentenced Gerard to twelve months and one day in prison, three years supervised release, and ordered a $100 special assessment. Gerard argues on appeal that the search warrant lacked probable cause and the evidence obtained under its authority should have been suppressed. He contends that Crymble conducted an illegal search when he climbed the ladder to peer through the vent of Gerard's locked garage. We disagree and hold the search was constitutionally valid.

II. *Discussion*

We traditionally employ the "clearly erroneous" standard in reviewing the district court's findings supporting a denial of a motion to suppress evidence obtained by a warrantless search, *United States v. Ball*, 90 F.3d 260, 262 (8th Cir. 1996), but we review legal conclusions de novo. *United States v. Davis*, 288 F.3d 359, 362 (8th Cir. 2002) (citing *United States v. Boyd*, 180 F.3d 967, 975 (8th Cir. 1999)).

Gerard's principal argument is that Trooper Crymble's use and ascent of a ladder on the side of the garage constituted an impermissible warrantless search and thus invalidated the subsequent warrant-based search. Gerard's position is that without the information obtained by climbing the ladder the warrant would not have been supported by probable cause. Based on our review, we conclude no prohibited search occurred prior to issuance of the warrant and that probable cause supported the warrant.

A. *Farmhouse's Curtilage*

The Fourth Amendment protects a home and its curtilage-the area immediately surrounding a dwelling house-from unreasonable warrantless searches. *United States v. Dunn*, 480 U.S. 294, 300-04 (1987). However, this protection does not extend past

the curtilage. Officers are permitted to enter a resident's property to observe buildings located outside the home's curtilage. *United States v. Mooring*, 137 F.3d 595, 596 (8th Cir. 1998). The central component in deciding whether Gerard's garage was within the cartilage of his farmhouse is to determine "whether the [garage] harbor[ed] the intimate activity associated with the sanctity of [Gerard's] home and the privacies of [his] life." *Dunn*, 480 U.S. at 300 (internal quotation marks omitted); *United States v. Mooring*, 137 F.3d 595, 596 (8th Cir. 1998).

We resolve curtilage questions with particular reference to four factors: the proximity of the garage to the farmhouse, whether the farmhouse and garage are within the same enclosure, the nature and uses of the garage, and the steps Gerard took to protect the garage from being seen by others. *Dunn*, 480 U.S. at 301; *Mooring* 137 F.3d at 596. ""[E]very curtilage determination is distinctive and stands or falls on its own unique set of facts."" *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 598 (6th Cir. 1998) (quoting *United States v. Reilly*, 76 F.3d 1271, 1276 (2d Cir. 1996)). Therefore, these factors are analytical tools used in determining whether Gerard's garage was so intimately tied to the farmhouse itself that it should be placed under the farmhouse's umbrella of Fourth Amendment protection. *Dunn*, 480 U.S. at 301.

Applying these four factors to Gerard's farmstead and the area immediately surrounding it, the district court's finding that the garage lay outside the curtilage of the farmhouse was not clearly erroneous. First, the record does not contain evidence of the distance from Gerard's house to his garage. Neither party included in its brief the proximity of the garage to the farmhouse. However, Crymble testified that the farmhouse and garage are in close proximity. The distance alone, however, is not determinative that the garage should be treated as an adjunct of the house.

Second, Gerard's garage did not lie within the fence surrounding the farmhouse. However, Gerard urges that the natural enclosure of trees surrounding both the farmhouse and the garage

mark the home's enclosure and that the land within it is protected by the home's curtilage. Specifically, Gerard argues that this wooded vegetation surrounding the farmhouse and the garage, enclosing both into the same wooded area, mark the farmhouse's curtilage similar to the protected curtilage found in *Daughenbaugh*. 150 F3d at 599. The fact that one's view from the road of the garage is obscured by the trees does not itself establish that the garage should be included within the farmhouse's Fourth Amendment protections. *Reilly*, 76 F.3d at 1277-78) (explaining that the enclosure factor weighs against those who claim infringement of the curtilage when their land is divided into separate parts by internal fencing).

The facts of *Daughenbaugh* are readily distinguishable from the facts of the case at bar. The garage in *Daughenbaugh* was in the backyard of the house and there was no artificial enclosure. 150 F.3d at 598-99. The Sixth Circuit concluded that the garage in the backyard of the house was sufficiently blocked from public view by natural barriers and weighed this factor in favor of finding that the garage was within the home's curtilage. *Id.* In contrast, Gerard's land is divided into separate parts by an internal fence enclosing Gerard's farmhouse. Unlike the garage in *Daughenbaugh*, Gerard's garage is located to the immediate left of the farmhouse and separated from it by a driveway.

Third, Gerard contends that the parking of his car and motorcycle in the garage are evidence that his garage was used for activities and privacies of domestic life requiring Fourth Amendment protection. Contrary to Gerard's testimony about his use of the garage, Crymble testified the garage appeared to only be used to store junk and grow marijuana. However, Crymble did not have this evidence concerning Gerard's use of the garage before he climbed the ladder. Objective data does not include that found only *after* officers have invaded the area in questions. *Reilly*, 76 F.3d at 1279 (emphasis added). We believe that reasonable officers would expect that the garage was likely to be used for private activities. The garage's doors were locked, electricity was wired

to the garage, and it was close to the farmhouse, which are typical signs of private activities. The third *Dunn* factor weighs in favor of finding that Gerard's garage was protected. However these factors are not applied mechanically or in isolation; therefore, this factor alone does not require us to conclude that Gerard's garage was intimately tied to the farmhouse.

Fourth, Gerard contends that he took steps to prevent casual onlookers standing in open fields from viewing inside the garage. The garage was set back from the road, situated so that it did not face the road. Gerard attempted to prevent public access to his garage by placing locks on all three of the doors to the garage. In addition, Gerard secreted the interior of the garage by placing plastic and cardboard in the windows. Also, the contents of the garage were not visible from aerial surveillance.

However, the evidence also shows Gerard's driveway led from the road directly to the garage. No internal fences prevented persons from approaching the garage. Also, Gerard posted no signs excluding strangers from access to the garage. Gerard did nothing to cover the marijuana odor escaping from the vent of the garage. Lastly, the garage was not completely blocked from view of members of the public driving down the street. Based upon the evidence in this case, we cannot say the district court clearly erred in finding that Gerard's garage was not within the farmstead's curtilage. We conclude that Crymble did not conduct an illegal search when he climbed the ladder to peer through the vent of Gerard's locked garage. *United States v. Gill*, 354 F.3d 963, 969 (8th Cir. 2004) (finding that an officer was entitled to place a ladder against a building to look through an open window to ensure that no one inside was in need of assistance).

B. *Probable Cause*

On appeal of the grant or denial of a motion to suppress, we review the district court's conclusions of law on probable cause de novo. *United States v. Wells*, 223 F3d 835, 838 (8th Cir. 2000).

When reviewing the sufficiency of an affidavit to support a finding of probable cause, we must consider the totality of the circumstances. *United States v. Wells*, 223 F.3d 835, 839 (8th Cir. 2000). A search is supported by probable cause if facts are shown making it likely that evidence of a crime will be found in the place to be searched. *United States v. Koons*, 300 F.3d 985, 990 (8th Cir. 2002).

The Supreme Court recognizes that the odor of an illegal drug can be highly probative in establishing probable cause for a search. *Johnson v. United States*, 333 U.S. 10, 13 (1948); *accord United States v. Caves*, 890 F.2d 87, 91 (8th Cir. 1989). Circuits have held that the odor of marijuana, standing alone, is sufficient to support probable cause. *United States v. Tobin*, 923 F.2d 1506, 1512 n.4 (11th Cir. 1991); *United States v. Nielson*, 9 F.3d 1487, 1490-91 (10th Cir. 1993); *United States v. Elkins*, 300 F.3d 638, 659 (5th Cir. 2002); *United States v. Moore*, 329 F.3d 399, 405 (5th Cir. 2003).

Here, McKain's affidavit provided (1) evidence that the officers believed that Gerard could be hurt within the garage, (2) that someone was recently in the garage because a light was on inside and music was coming from a small radio located on the floor inside the garage, (3) that Gerard's credit card was found on a recent arrestee, and (4) that the odor of marijuana was emanating from the vent of the garage when Crymble climbed the ladder. Given the totality of the circumstances present, we conclude that the affidavit stated sufficient facts making it likely that evidence of a crime would be found in Gerard's garage. Because we hold that there was probable cause supporting the search warrant, we need not address whether the district court erred in applying the *Leon* good-faith exception.

III. *Conclusion*

Based on the foregoing analysis, we affirm the decision of the district court.